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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Federal Communications Commission in 1965 and 1966 adopted regulations that, *inter alia*, require cable systems to retransmit the signals of local broadcast stations that request carriage on the system. In 1968, after this Court upheld FCC jurisdiction to adopt such rules, the Eighth Circuit held that the rules were not invalid under the First Amendment. In 1985, in reviewing an FCC denial of an *ad hoc* waiver of the must-carry rules and an agency decision declining to institute rulemaking proceedings to consider whether the rules should be repealed, the District of Columbia Circuit (per Wright, J.), in the decision below, held that the must-carry rules were invalid as an abridgement of the First Amendment rights of cable television operators because the rules "coerced speech," thereby impinging on the "editorial discretion" of cable operators, and because the agency had failed to sustain its heavy burden of justifying the need for that deprivation of First Amendment rights.

The questions presented are:

1. For First Amendment purposes, are cable television systems to be treated as passive conduits for the "speech" of others, insofar as the systems are engaged in retransmitting the signals of television broadcast stations, or is that retransmission activity itself a form of "speech" within the meaning of the First Amendment?

2. Did the court below misapply the test for assessing "incidental" burdens on speech articulated in *United States* v. *O'Brien*, and thus exceed the proper scope of judicial review of administrative agency action, by concluding that the must-carry rules were unconstitutional because other, less speech-restrictive regulations might suffice to achieve the agency's purposes and by imposing a heavy burden of justification for the need for such rules?

3. After determining that the constitutionality of agency rules is dependent on a factual analysis of events and trends

following the agency's initial adoption of the rules, should the reviewing court remand the case so that agency, in the first instance, will develop that factual analysis?

LIST OF PARTIES

The parties in the consolidated cases decided by the Court of Appeals were Quincy Cable TV, Inc. ("Quincy"), petitioner in No. 83-1283, and Turner Broadcasting System, Inc. ("Turner"), petitioner in No. 83-2050. The Federal Communications Commission ("FCC") and the United States were respondents in both cases. The intervenors in No. 83-1283[1] and in No. 83-2050[2] are listed in the margin.

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[1]KHQ, Incorporated; Spokane Television, Inc.; King Broadcasting Company; Association of Independent Television Stations, Inc.; National Association of Broadcasters; and Town of Quincy, Washington.

[2]Metromedia, Inc.; Multimedia, Inc.; Community Antenna Television Association, Inc.; Black Entertainment Television; National Religious Broadcasters; The Seven Hills Television Company; Association of Independent Television Stations, Inc.; Corporation for Public Broadcasting; National Association of Broadcasters; Spanish International Communications Corporation; Bahia de San Francisco Television Company; Cosmos Broadcasting Corp.; Cox Communications, Inc.; Forward Communications Corp.; Illiana Telecasting Corp.; National Association of Public Television Stations; Columbus Broadcasting Company, Inc.; King Broadcasting Company; National Cable Television Association, Inc.; Association of Maximum Service Telecasters, Inc.; McGraw-Hill Broadcasting Company, Inc.; John H. Phipps Broadcasting Stations, Inc.; Summit Radio Corp.; Guaranty Broadcasting Corp; Wilson Communications, Inc.; Ralph C. Wilson Industries, Inc.; National Broadcasting Company, Inc.; Station Representatives Association; Taft Television and Radio Company, Inc.; and Maranatha Broadcasting Company, Inc.

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JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The parties joining in this petition,[1] all of whom were intervenors in the Court of Appeals, consist of various representatives of the television broadcast industry, including all of the major trade associations representing television broadcast licensees and several licensee corporations.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, is reprinted in Appendix A at pp. 2a-60a. An earlier opinion by the Court of Appeals (per curiam)

[1]National Association of Broadcasters, Association of Maximum Service Telecasters, Inc., Association of Independent Television Stations, Inc., KHQ, Inc., Mararatha Broadcasting Company, Inc., Metromedia, Inc., National Broadcasting Co., Inc., National Religious Broadcasters, Spanish International Communications Corp., Bahia de San Francisco Television Co., The Seven Hills Television Co., Spokane Television, Inc., and Station Representatives Association, Inc.

remanding the *Quincy* case to the FCC, reported in 730 F.2d at 1549, is reprinted in Appendix B, pp. 63a-68a. The FCC's *Memorandum Opinion and Order* denying Turner's petition for rulemaking, reported at P&F 55 Rad. Reg. 2d 1365 (1984), is reproduced in Appendix C, pp. 69a-74a. The six opinions of the FCC and its staff in the *Quincy* matter are reprinted at pp. 75a-132a in Appendix D. Three of those opinions are reported at 89 FCC 2d 1128, 93 FCC 2d 2112, and 98 FCC 2d 1287.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AGENCY REGULATIONS INVOLVED

The FCC rules held unconstitutional by the court below are codified at 47 C.F.R. §§ 76.57-.61 (1984), and are reproduced in Appendix E, pp. 133a-136a.

STATEMENT OF THE CASE

Typically cable television systems perform several distinct functions or services. So far as the record shows here, all systems retransmit the signals of television broadcast stations. These signals may be originated by nearby local broadcast stations, and in some instances cable may improve for subscribers the picture quality they would otherwise obtain from one or more of the local stations.[2] The signals may also be originated by "distant" stations which the cable system obtains through the use of (1) a tall tower not usually available to private home owners, (2) terrestrial microwave radio relay facilities, or (3) a

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[2]For consistently good reception, particularly in color and for UHF stations, an outdoor antenna, rather than set-top VHF "rabbit ears" and a small UHF "loop", is often essential. However, cable eliminates the need for an outdoor antenna, and for substantial numbers of viewers (such as apartment dwellers and those living in subdivisions that restrict outdoor antennas for aesthetic reasons) cable is the only practical alternative to "rabbit ears" and the UHF "loop."

communications satellite towards which the cable system orients a saucer-shaped satellite receiving "dish." Most systems also distribute some non-broadcast signals originated by various entities specifically for redistribution solely or primarily through cable systems. A few systems also originate some programs of their own.

When it initially adopted the must-carry rules, the FCC articulated several distinct bases and purposes: (1) the rules insure that cable subscribers will have ready access to local stations licensed to serve those viewers; (2) the rules insure that no local station will be placed at a competitive disadvantage vis-a-vis distant stations and such local stations as the cable system voluntarily carries;[3] (3) together with other rules, the must-carry rules offset the unfair competitive advantage that cable systems enjoy as a result of not having to bargain for program rights under the copyright laws and not having to obtain rebroadcast consent from distant stations pursuant to Section 325 of the Communications Act; and (4) in the absence of must-carry rules, cable systems potentially could block or impede the local broadcaster's access to enough homes to pose a serious threat to the economic viability and even to the very survival of some local stations. *First Report and Order in Docket No. 14895, et al.*, 38 FCC 683, 700-01, 705-06, 713-15 (1965) ("*First Report*"); *Second Report and Order in Docket No. 14895, et al.*, 2 FCC 2d 725, 734-37, 770-78 (1966) ("*Second Report*").

The agency also concluded that the must-carry and network nonduplication rules[4] might not suffice to ameliorate the poten-

[3]The agency noted that

> [i]f the distant stations themselves were to establish a [cable] system carrying their signals, the anticompetitive character of their failure or refusal to carry the signals of local stations would be obvious. We think it no less obvious where the CATV system is independently owned.

First Report and Order in Docket No. 14895, *et al.*, 38 FCC 683, 705 (1965).

[4]The network nonduplication requirements, which were not before the court below, require cable systems upon request to delete network programs from distant stations that duplicate the broadcasts of local stations.

tial adverse economic impact of cable, and thus went on to adopt other rules limiting distant signal importation. From 1968 through 1972, the agency conducted another extensive rulemaking proceeding which resulted in new distant signal limitations and some modifications in the must-carry and network nonduplication rules. *Cable Television Report and Order*, 36 FCC2d 143, *on reconsid.*, 36 FCC2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). Here too the agency explained that, quite apart from questions of adverse economic impact, the must-carry rules served the objective of insuring that local stations "are not denied access to the audience they are licensed to serve. . . ." 36 FCC2d at 173.

Still later, after considering various econometric studies and "actual case" histories of stations in the several areas in which extensive distant signal carriage had been "grandfathered," the FCC, in 1980, concluded that the incremental damage to broadcast service resulting from repeal of the distant signal limitations would not be likely to jeopardize broadcast service. One principal basis for this conclusion was the agency's finding that the benefits to UHF stations (historically more vulnerable financially) of having their signals carried on local cable systems would very substantially offset, and indeed in some instances more than offset, the negative impact resulting from the importation of distant signals by those systems.[5]

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[5]As the then Chairman of the FCC put it,

> our staff has found that cable has in many cases improved the profitability of broadcast stations by improving the reception of an otherwise weak UHF signal.

Cable Television Syndicated Program Exclusivity Rules, 79 FCC2d 663, 891 (1980) *aff'd sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (separate statement of Charles D. Ferris, Chairman).

For a variety of reasons, including established viewer habits, poor UHF antennas, and inherent technological differences, UHF stations are at a disadvantage in competing with local VHF stations. It was thought that cable carriage would largely eliminate this so-called "UHF handicap."

Throughout this period, cable television has continued to enjoy what the agency characterized in 1965 as cable's "explosive growth." Although cable systems at that time served less than 2 million subscribers, a recently published study commissioned by the cable industry projects that by year-end 1985 some 36.9 million American households (43 percent of all households having television sets) will be subscribing to cable television; cable television annual revenues are expected to exceed $8.3 billion by that date, and to jump to more than $16 billion by 1990.[6]

Shortly after the agency's 1980 rulemaking decision, respondent Turner filed a petition with the FCC asking for yet another rulemaking proceeding, this one to delete the must-carry rules. Turner is the licensee of WTBS, an Atlanta television broadcast station that promotes itself as a "Superstation" and is distributed via satellite retransmission on many cable television systems throughout the country. Turner also originates two program services, Cable News Network ("CNN") and CNN Headline News, which it distributes primarily through cable systems. The petition contended that the rules were no longer necessary and in any event were unconstitutional abridgements of freedom of speech.

The agency, on April 6, 1984, adopted a brief order denying the Turner petition. Appendix C, pp. 69a-74a. Conceding that there were conflicting policy considerations, the FCC noted that the peculiar marketplace advantage that cable enjoys as a result of its compulsory copyright license to retransmit broadcast signals was adopted by Congress in an apparent belief that the must-carry rules would remain in place.[7]

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[6]Arthur D. Little, Inc., "Prosperity for Cable TV: Outlook 1985-1990," Report to National Cable Television Association, pp. A1-1 - A1-2 (May 1985).

[7]The order also observed that the two most significant factual developments since 1965-65, increased numbers of cable subscribers (which made the potential consequences of non-carriage more significant) and increased cable channel capacity (which renders compliance with the rules less burdensome), supported retention of the rules (A., p. 71a).

In 1979 respondent Quincy Cable TV, the operator of a cable system in Quincy, Washington, asked the FCC to waive its must-carry rules so that Quincy would not be obliged to carry the three network affiliated stations located in Spokane, Washington. At the time and well into 1984, Quincy contended that carriage of the three Spokane affiliates would require the system to drop either the distant signals of the Seattle network affiliates or other program services which Quincy thought would be more popular among subscribers than the Spokane stations. The FCC denied the Quincy petition and after various petitions for reconsideration Quincy sought judicial review. Shortly before oral argument, the lower court learned that the Quincy facilities had increased their channel capacity from 12 to 32 channels in 1982 and 1983. Thus, contrary to its claims in the court of appeals and before the agency, complying with the must-carry rules would not oblige Quincy to discontinue retransmitting or originating any other service.[8] Following a remand, the FCC reaffirmed its decision and Quincy went forward with its petition for judicial review.

The two cases, which were before the lower court pursuant to 47 U.S.C. § 402(b), were sua sponte consolidated after oral aargument. On July 19, 1985, the panel issued its decision (Appendix A) in which it concluded that the FCC failed to carry its "heavy burden" of justifying the constitutionality of the must-carry rules under the First Amendment.

Judge Wright's opinion, in which Judges Ginsburg and Bork joined, holds as an initial matter that the retransmission of broadcast signals by cable television systems is a protected First Amendment activity because it involves an exercise of "editorial discretion." *See* Appendix A, pp. 20a-21a, 36a-37a.[9] By requiring cable operators to carry the signals of local broad-

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[8]The expansions, first to 24 channels in June 1982 and later to 32 channels in January, 1983, cost the system "'approximately $250,000.'" *See Quincy VI*, Appendix D, p. 127a, 98 FCC 2d at 1289 & n.5.

[9]References to the Appendices will hereinafter be abbreviated "A." *E.g.*, A., pp. 19a-20a.

casters, the must-carry rules "coerce speech" and therefore, in the panel's view, constitute a serious deprivation of a cable system's "otherwise broad discretion to select the programming it offers its subscribers" (A., p. 37a).

Although apparently conceding that the must-carry rules are content-neutral, in the sense that the rights and obligations they create are not dependent in any way on the content of a broadcaster's programs, the lower court asserts that the rules may be more than an "incidental burden on 'speech'" (within the meaning of *United States* v. *O'Brien*, 391 U.S. 367 (1968)) because "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage [for broadcasters] over cable programmers" (A., p. 36a).

Nonetheless, the Court of Appeals states that it need not "definitively decide" whether the must-carry rules amount to more than an incidental burden on speech because the rules cannot pass muster under the *O'Brien* requirements applicable to such incidental burdens. The rules do not serve a substantial governmental interest, in the panel's view, because (1) the FCC concluded in connection with its 1980 decision to repeal the distant signal restrictions that, at least as to VHF stations, cable television posed no threat to the economic vitality of local broadcasting (A., pp. 43a-47a); and (2) in any event the FCC has failed adequately to carry "its heavy burden of justification" to show that the rules are necessary to prevent serious injury to broadcast service (A., pp. 47a-52a). Moreover, the rules fail under the *O'Brien* test, as perceived by the Court of Appeals, because the rules are "grossly overinclusive" with respect to the purpose of preventing injury to local broadcast service, inasmuch as all local stations are entitled to be carried regardless of their economic viability, their total number, and the extent to which they are in fact broadcasting local programs (A., pp. 52a-59a).

On August 2, 1985, the FCC announced that it would not seek further review of the lower court's decision. The three-

member majority explained that they supported congressional legislation to establish a new scheme of full copyright liability for cable retransmissions of broadcast signals and that such legislation was necessary to redress the "unbalanced" situation brought about by the lower court's decision. The majority rejected the possibility, left open by the Court of Appeals, of attempting to develop new must-carry rules because the majority could not "conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision." (A., p. 138a)

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Must-Carry Rules Are Objectionable On First Amendment Grounds Because They Interfere With The "Editorial Discretion" Of Cable Operators Should Be Reviewed By This Court Because That Ruling—

(a) Involves An Important Issue Of Constitutional Law That Ought To Be Resolved By This Court;

The must-carry rules do not forbid, deter or penalize speech by cable operators or by anyone else. Instead, the rules simply require cable operators not to impede or frustrate the access of viewers to local television stations licensed to serve local needs and interests. How the rules nonetheless infringe on First Amendment interests is therefore far from self-evident.

The court below thought that the rules impinged upon the "editorial discretion" of cable operators.[10] But this impingement is slight if not illusory. Although some systems have

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[10]The panel also sharply criticizes the rules for hampering the access that cable programmers might otherwise enjoy to cable subscribers, but appears to have done so primarily as a means of justifying the standing of Turner to complain about the must-carry rules. (*See* A., pp. 24a-25a, n.24; 36a.) In any event, the must-carry rules have no impact whatever on the program content or editorial discretion of cable programmers, and at worst have only an indirect impact on the place or manner by which the cable programmer engages in "speech".

limited channel capacity at various times, the consequence of the must-carry rules in such instances is that cable operators *either* have to forgo carrying some other program service in order to accommodate local stations *or* operators must invest in the hardware needed to increase channel capacity. Any immediate shortage of channels results not so much from the must-carry rules as from cable operators' lack of foresight as to optimal channel capacity, or perhaps a reluctance immediately to invest in greater channel capacity.

The lower court asserts that coerced speech is ipso facto an infringement on a cable operator's "editorial discretion" in light of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The panel regards *Tornillo* as applicable to cable television because there is an almost infinite number of cable channels and hence the so-called "scarcity rationale" does not apply to the "medium" of cable (A., pp. 28a-34a). Yet it is only the "scarcity" resulting from the operator's private decisionmaking as to what channel capacity to install that creates the possibility of the must-carry rules causing the operator to forgo transmission of other program services. It is, in short, only this privately induced "scarcity" that gives rise to the panel's First Amendment concerns.

In any event, the state statute condemned in *Tornillo* was quite different from the must-carry rules. It gave candidates for public office a right to demand that, whenever a newspaper assailed a candidate's "personal character or official record," the newspaper print the candidate's reply in as conspicuous a place and in the same kind of type as the offensive speech the statute was plainly designed to deter. 418 U.S. at 244. Thus, the statute imposed a penalty "on the basis of the content of the newspaper." 418 U.S. at 256. The obligations of the must-carry rules, in contrast, are not in any way triggered by the content of the speech, either by cable operators or by broadcasters. Rather, the rules simply prohibit cable operators from favoring some broadcast stations, whether local or distant, over other broadcast stations (the local station or stations the cable operator might elect not to carry).

The court below speculated, with some persuasiveness, that a law requiring vendors of newspapers to carry local publications, even though content neutral, would be highly suspect under the First Amendment (A., p. 37a, n.37). But the analogy begs the real issue, which is whether, with respect to its use of broadcast signals, cable television is an independent expressive activity or merely a conduit through which expressive activity passes. A railroad or trucking concern moving newspapers or books from point A to point B transports "speech" (in print form) in much the same way that a cable system retransmits the electronic speech of broadcast stations. Nonetheless, a decision holding unconstitutional under the First Amendment administrative regulations that prohibit carriers from discriminating among publisher-shippers, on the theory that those regulations "coerced speech" by the carrier, would be novel indeed.

To the extent the decisions of this Court shed light on which analogy applies to cable television retransmission of broadcast signals, they support reliance on the carrier analogy.

In 1968 this Court concluded that, unlike a broadcaster and despite its use of sophisticated technical equipment, a cable system retransmitting broadcast signals was essentially an extension of the viewer's reception equipment and thus not a program "performer" for purposes of copyright liability.[11] Subsequently, in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court extended this immunity to cable systems that were exercising the "editorial" functions of selecting for retransmission purposes several very distant signals in preference over many other less distant stations that might be carried, and were using other cable channels for the purpose of distributing non-broadcast materials. The respondent thus contended, in much the same manner as the court below reasoned in the instant case, that cable television had changed its character and could no longer be

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[11] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

treated as a passive conduit. 415 U.S. at 402-04. This Court dismissed that contention as based on a

> logical flaw: in none of these operations is there any nexus with the defendants' reception and rechannelling of broadcasters' copyright materials.

Id. at 405. *Teleprompter* also rejected the notion that, in selecting among many distant broadcast signals, cable systems were taking on the attributes of broadcast stations and other originators of television service. *Id.* at 410. Congress subsequently passed new copyright legislation, but it too treats cable as more akin to a conduit than a speaker. Thus, that legislation gives cable systems a compulsory license to retransmit broadcast signals, but largely forbids any "editorial discretion" by the cable operator in terms of deleting or substituting commercial or program material or retransmitting the broadcast signal on other than a simultaneous basis.[12]

In any event, it should be this Court and not a court of appeals that decides authoritatively whether, for First Amendment purposes, the selections cable operators make among various broadcast signals is more nearly akin to the function of the newspaper of *Tornillo* (or even the newspaper vendor in the lower court's hypothetical) on the one hand, or — as this Court's copyright decisions indicate — akin to a mere carrier or conduit of expression, the conveyor belt of the printing press and not the printer.

This question is one of the utmost importance, not merely to cable operators and broadcasters but to the public as a whole. Today cable television is a multi-billion dollar industry, providing a key link between nearly half the nation's households and the television stations which thereby may or may not be available for viewing in those households.[13] Prior to the ruling

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[12]Copyright Revision Act of 1976, 17 U.S.C. §§ 111(c)(3), (e), (f) (1984).

[13]True, the panel below asserted that cable television subscribers could circumvent the cable system in order to receive signals of local stations with an alternative reception mechanism such as an outdoor antenna (A., p. 15a). As will be seen, however, this assertion has little basis in fact and is subject to serious qualification even as a theoretical matter. *See* pp. 23-24, *infra*.

below, the FCC had for some 20 years insured that cable operators would not block or impede access by their subscribers to the signals of local broadcast stations. Now, however, if the decision below stands, cable television operators will be the sole arbitrators of what television signals these millions of homes are able to watch. Moreover, since it rests squarely on constitutional grounds, the decision below indicates that the Congress, state and local governments, and the FCC are virtually helpless to insure against abuses of the gatekeeper control that cable systems exercise over a large proportion of the Nation's television service.

In upholding the FCC's authority to adopt the rules now declared unconstitutional by the court below, this Court noted that the FCC

> has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.

United States v. *Southerwestern Cable Co.*, 392 U.S. 157, 177 (1968). The court below, without any support or guidance from the decisions of this Court, has now shifted a large portion of those broad responsibilities from the FCC to cable operators. The significance of that change, given the fact that cable has now become the principal means by which some 40 percent of the population receives television signals, can scarcely be exaggerated.

(b) Is Inconsistent With the Result Reached In Several Decisions of This Court And In Direct Conflict With Decisions Of Other Lower Federal Courts;

In addition to its importance, the result reached below simply cannot be squared with various decisions by this Court involving cable television issues.

This Court in *Southwestern*, *supra*, upheld the FCC's assertion of jurisdiction because the FCC's judgments that regula-

tion was necessary were reasonable. In contrast, the Court of Appeals now holds that those agency judgments are insufficient to save the regulations from a claim that they are unconstitutional abridgements of freedom of speech. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"), this Court upheld a regulation requiring larger cable television systems to originate some programs of their own, the theory being that that requirement served the purposes of the Communications Act by augmenting the outlets for local self-expression. Even though this mandatory origination rule was clearly much more intrusive on "editorial discretion" than are must-carry rules relating to broadcast signals, none of the three opinions in *Midwest I* so much as hints that the rule posed a First Amendment issue, although the plurality opinion notes in dicta that constitutionality of the must-carry rules has been "correctly" upheld in several courts of appeals' decisions. 406 U.S. at 659, n.17. The decision below, if allowed to stand, tells the lower courts that rules such as the one upheld in *Midwest I* must now be regarded as unconstitutional.

In *Capital Cities Cable, Inc.* v. *Crisp*, ____ U.S. ____, 104 S. Ct. 2694 (1984), the Court held that state regulations requiring cable television operators to delete advertisements for alcoholic beverages from broadcast signals carried by the cable systems were invalid under the supremacy clause, despite the broad authority reserved to the States under the Twenty-first Amendment, because the FCC's long history of regulating broadcast signal carriage by cable television systems, and more specifically its must-carry rules, established the existence of an "important and substantial" federal interest justifying preemption. 104 S.Ct. at 2708. Now, just over a year later, the rules designed to achieve that "important and substantial" federal interest have been declared invalid by the court below.[14]

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[14]The respondents in *Crisp* attempted to argue, just as the respondents in the instant case successfully argued below, that the FCC's must-carry rules are invalid under the First Amendment; but this Court refused to address that issue, noting that the cable petitioners in that case had made no such First Amendment claim and that the respondents lacked standing to do so. 104 S.Ct. at 2701 n.6.

The lower court sees some support for its result in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1974) ("*Midwest II*"). But there, while acknowledging that the First Amendment objections to mandatory access rules discussed in dicta by the lower court were "not frivolous," this Court explained "that the asserted constitutional issue did not determine or sharply influence our construction of the statute." 440 U.S. at 709, n.19. *Midwest II* also stressed that its ruling had no adverse implications for the FCC's broadcast signal carriage rules. *Id.* at 706-07, n.16. Clearly there is an enormous gap between this "not frivolous" observation and the result reached below. Moreover, in contrast to the careful preservation in *Midwest II* of the distinction between cable retransmission of broadcast signals and cable distribution of other programming, the lower court in the present case seeks to justify its decision by rejecting, or at least ignoring, that distinction.

Besides being irreconcilable with several decisions of this Court, the lower court's holding is in direct conflict with several decisions by other federal Courts of Appeals.

The court below appears to concede that the result reached flatly contradicts *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968), and several other cases disparaged for being of that "early" vintage (A., p. 19a).[15] But the "more recent" cases relied upon below do not demonstrate that *Black Hills Video* and its progeny are no longer followed by other lower courts. For example, in *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (per curiam, Circuit Judges Wright and MacKinnon, and District Judge Weigel), the principal recent lower federal court case relied upon below, the D.C. Circuit held that the FCC had no jurisdic-

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[15]The list of conflicting cases is somewhat longer and not quite as ancient as the panel indicates. *Black Hills* was cited with approval in Community Communications Co. v. City of Boulder, 630 F.2d 704, 713 (10th Cir. 1980), *rev'd on other grounds*, 455 U.S. 40 (1982), and in General Telephone Co. of Southwest v. United States, 449 F.2d 846, 853 (5th Cir. 1971). *See also* Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969) (non-duplication rules valid).

tion to regulate the precise content of so-called pay TV channels originated for distribution primarily through cable systems. But unlike the decision below, *Home Box Office* cited the holding of *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, *supra*, 415 U.S. at 405, that no "nexus" exists between a cable system's retransmission of broadcast signals and its distribution of other programming (567 F.2d at 45, n.80), and took care to avoid calling into constitutional question FCC regulations pertaining to cable television use of broadcast signals.[16]

Clearly the lower courts deserve guidance as to whether *Black Hills* or the decision below is good law.[17] Only review by this Court can provide such guidance.

(c) And, If Allowed To Stand, Is Likely To Mislead Or Confuse Other Lower Courts Facing Various Other First Amendment Issues Involving Cable Television.

By extending *Tornillo's* condemnation of "coerced speech" to virtually any regulation affecting a cable television operator's

[16]In addition to *Home Box Office*, the opinion below cites three other lower federal court decisions for the very general proposition that cable operators enjoy some measure of First Amendment rights. None of those decisions, however, provides substantial support for the lower court's bold result, destroying as it does an administrative agency's regulatory scheme of some 20 years' standing. The language cited in Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), is dicta, and relates not at all to cable carriage of broadcast signals. The other two, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sep. 6, 1985) and Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1336 (D.C. Cir. 1985) (per Wright, J.), both turning largely on the public-forum doctrine, involved restrictions on the construction of cable systems, and hence on any opportunity to use cable as a means of distributing original programming.

[17]Although a three-member majority of the FCC announced it would accept the decision below on the assumption that Congress may make appropriate changes in the copyright law, future FCC refusals to enforce the rules, whether based on the lower court's decision or some other grounds, may under 47 U.S.C. § 402(b) be reviewed in any Court of Appeals in which a petitioning party resides.

control over the use of cable channels, and by obliterating the heretofore sharp line between regulatory measures relating to cable television's use of broadcast signals and such other cable television activities as the distribution of programming originated for cable, the decision below becomes an important precedent indicating that numerous statutes and regulations that require cable television systems to surrender any hegemony over their channels run afoul of the First Amendment. Such issues are already arising in other cases, and are likely to become even more acute in the future.

Many cable television franchising authorities extract various commitments from cable television operators as a *quid pro quo* for permitting them to bury or string their cables and related equipment on public property. For example, cable operators that will not provide access channels or other program services are frequently prohibited from installing cable facilities. At least two different circuit courts have concluded that, particularly in light of cable's natural monopoly status, regulatory measures of this sort are not barred by the First Amendment. See *Omega Satellite Products* v. *City of Indianapolis*, 644 F.2d 119, 127-29 (7th Cir. 1982); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). But the D.C. Circuit and the Ninth Circuit evidently disagree, in part on the theory that the property on which cable is strung or buried constitutes a "public forum" to which access can be limited or conditioned in only the most pressing of circumstances, and in part on the *Tornillo* analogy developed more fully in the decision below. *Tele-Communications of Key West, Inc.* v. *United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985). If the decision below is allowed to stand, it will accelerate the instances in which such state, local, and sometimes federal franchise provisions are challenged as unconstitutional.

Another such issue is the constitutional question this Court noted but did not address in *Midwest II*. The Cable Communi-

cations Policy Act of 1984, 47 U.S.C. §§ 501 *et seq.*, specifically authorizes franchise authorities to establish access channels for public, educational and governmental use, and also directly imposes certain federal leased channel requirements on cable systems. Although noting that First Amendment objections have been raised with respect to access channel requirements, the legislative history indicates that Congress nonetheless chose this approach in the belief that access channel requirements could pass constitutional muster. Specifically, by fostering the availability of a "diversity of viewpoints," consistent with the goals of the First Amendment, access channel requirements were perceived by the Congress as content neutral, and otherwise permissible structural regulation. Report of the Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 31-36 (1984). Moreover, just as this Court's decision in *Teleprompter* treats cable television as a passive conduit for purposes of broadcast signal retransmission, Congress expressed the view that

> With regard to the access requirement, cable operators act as a conduits [*sic*]. They do not exercise their editorial discretion over the programming; nor are they prevented or chilled in any way from presenting their own views and programming on the vast majority channels otherwise available to them.

Id. at 35.

The decision below flatly contradicts this Congressional statement, and rejects any distinction between the use of cable channels for broadcast and nonbroadcast purposes. It thus invites litigation challenging a recent Act of Congress, and the invitation has not gone unnoticed. *See* B. Fein, *'Quincy' Decrees First Amendment Cable Rights*, Legal Times, Aug. 12, 1985, at 10, 12 (contending access provisions in the new Cable Act must now be regarded as unconstitutional).

However, if the rationale of the court below is wrong — and only this Court can authoritatively resolve that question — the lower federal courts should be apprised of the error so that the

unconstitutionality of that statute will not be regarded as an a fortiori case based on the decision below.

2. The Lower Court's Application Of The O'Brien Test Represents Such A Departure From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise of This Court's Supervisory Powers.

Although purporting to apply and follow *United States* v. *O'Brien*, 391 U.S. 367 (1968), the decision below is seriously in conflict with that case and with three other very recent decisions of this Court. *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, ____ U.S. ____, 104 S. Ct. 2118 (1984); *Clark* v. *Community for Creative Non-Violence*, ____ U.S. ____, 104 S. Ct. 3065 (1984); *United States* v. *Albertini*, ____ U.S. ____, 105 S. Ct. 2897 (1985). The lower court's sweeping departure from the decisions of this Court is likely to cause serious confusion among lower federal and state courts in any case in which an administrative agency's regulations are challenged on First Amendment grounds.

O'Brien upheld the constitutionality of a statute that prohibited knowingly destroying or mutilating selective service registration certificates and of agency regulations requiring registrants to keep their draft cards in their personal possession at all times. Conceding that O'Brien's burning of his draft card in public to express his opposition to the Vietnam War was a form of speech subject to First Amendment protection, the Court nonetheless upheld *O'Brien's* conviction, explaining that a government regulation that incidentally affects speech does not violate the First Amendment if (1) the regulation is otherwise within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of free expression, and (4) the incidental restriction is no greater than is essential to the furtherance of the governmental interest. 391 U.S. at 377. In applying this test, *O'Brien* did not impose on the agency a heavy burden of demonstrating the need for the rule or contrive to fashion less speech-restrictive alternatives that

might have been adopted in lieu of the measures actually before the Court.

In *Clark* v. *Community for Creative Non-Violence*, *supra*, a majority of the D.C. Circuit, sitting en banc, had held that regulations of the United States Park Service prohibiting "camping" (and defining "camping" as including "sleeping" activities) impermissibly abridged the respondents' First Amendment rights to demonstrate by sleeping in tents erected in certain parks. In reversing, this Court held that the regulations were valid, both because they constituted reasonable restrictions on the time, place, and manner of demonstrations and because they passed muster under *O'Brien*. The less speech-restrictive alternatives suggested by the D.C. Circuit majority were said to

> represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States* v. *O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

104 S.Ct. at 3072 (footnote omitted). Relying on this language, *United States* v. *Albertini*, *supra*, holds that *O'Brien* does not dictate that agency rules are invalid because less speech restrictive alternatives exist. 105 S. Ct. at 2907.[18]

Applying *O'Brien* as this Court has applied it in the foregoing cases requires no extended or difficult analysis in the case

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[18] *Taxpayers for Vincent*, *supra*, involved a municipal ordinance forbidding the use of lamp posts and street signs for the purpose of displaying messages such as support for political candidates. The municipality's interest in protecting the aesthetics of city streets was held to be sufficiently substantial to justify the ordinance even though it only "imperfectly" served the aesthetic goal.

at hand. *Southwestern* is conclusive as to the first two parts of that test, holding as it does that the must-carry rules are clearly otherwise within the constitutional (statutory) authority of the agency and that there is an important and substantial governmental interest in assuring the growth and development of local television broadcast service.[19]

The remaining two portions of the *O'Brien* test, as construed by this Court, are also easily satisfied. The purpose of the must-carry rules is clearly unrelated to the suppression of free expression; rather, the purpose is to enhance the prospects for additional outlets for speech and to prevent distortions of the competition among broadcasters by insuring that cable systems do not block or impede the access that local broadcasters would otherwise have to viewers' homes. Finally, the agency's judgment that the must-carry rules are the minimum measures necessary to maintain competitive parity between cable and broadcasting and among different broadcasters — judgments characterized as "reasonable" in *Southwestern* (392 U.S. at 173, 175) — are not to be second-guessed.

The decision below reaches the opposite result, but does so only by ignoring the letter and violating the spirit of this Court's sharply-worded admonition in *Clark*.[20]

Perhaps, as a matter of sound communications policy, the FCC's must-carry rules should be reexamined. Perhaps they ought to be modified in some respects. Perhaps, as a matter of agency discretion, if appropriate amendments to the Copyright Act were adopted, a majority of the current FCC Commissioners would even opt for repeal of the rules. But those possibilities cannot justify an interpretation of *O'Brien*

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[19]If *Southwestern* was not conclusive, the holding in *Capital Cities Cable, Inc.* v. *Crisp*, *supra*, that the must-carry rules carry out an "important and substantial" federal interest, would be.

[20]*Clark* is cited but once, and then merely as a "see also" reference following a citation to the lower court decision which it reversed (A., p. 52a). The lower court's opinion similiarly contains one passing reference to dicta in *Albertini* (*Ibid.*), while the holding of that case is ignored.

that has the consequence of turning a reviewing court, whenever faced with First Amendment claims, into a super-agency that is entitled to substitute its judgment concerning the appropriateness of agency rules. That is what happened here, and is likely to happen again if the decision below is allowed to stand.

3. The Lower Court's Action In Resolving The Ultimate Substantive Constitutional Issues Without The Benefit Of A Full-Fledged Agency Rulemaking Proceeding Raises Serious Issues Concerning the Proper Scope of Judicial Review That Warrant Examination By This Court.

Neither of the petitions for review before the lower court required the wide-ranging constitutional judgments rendered by the panel. *Quincy* is not a case in which the facts support the theoretical possibility that the must-carry rules could interfere with cable origination speech. Quite the contrary, the cable operator had made the capital investment necessary to expand its channel capacity, thereby eliminating the dilemma that constitutes the predicate for its constitutional claims. *Turner* came before the lower court on an agency denial of a request to initiate a rulemaking proceeding, a matter normally regarded as involving a very substantial degree of agency discretion and hence a very narrow scope for judicial review. *E.g.*, *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981) (per Edwards, J.; "[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking"). Even in those most rare and compelling of cases, the remedy for agency error would be an order requiring the agency to conduct rulemaking proceedings. *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979).

Here, however, the D.C. Circuit went far beyond anything that even its own generous precedents would support. Instead of directing the FCC to revisit the need for the existing must-carry rules, the panel in effect conducted its own rulemaking proceeding, finding facts, assessing industry trends, and resolving various judgmental issues in the process. In reviewing

a district court's dismissal of a complaint for failure to state a cause of action a court of appeals may well adopt a different view of the law, but that does not authorize the appellate court's concurrently conducting its own truncated trial on the merits and then entering a final judgment in favor of the plaintiff. *Cf. Tele-Communications of Key West, Inc.* v. *United States*, 757 F.2d 1330 (D.C. Cir. 1985) (per Wright, J.; reversing and remanding a dismissal of a complaint alleging that the government's refusal to permit installation of cable television facilities deprives the plaintiff of First Amendment rights). Yet, in the context of review of agency action, that is precisely what the lower court did in this case, finding on its own such facts as it regarded as dispositive and then declaring on the basis of those findings that the 20 year old agency rules are now unconstitutional.

Quite apart from its unfairness to interested parties who had no reason to think (at least until the decision below) that complete factual showings on the merits need be made in responding to requests to conduct rulemaking proceedings, the panel's bold approach creates a significant risk of serious judicial blunders, for appellate courts are ill-equipped to conduct fact-finding, particularly on complex, technical matters. The opinion below provides a wealth of examples to support this point.

The lower court finds that broadcast stations are "capable of bypassing the cable system altogether" (A., p. 39a), because a so-called A/B switch may be installed at the VHF terminals enabling the homeowner to receive channels 2-13 without the aid of cable, and because cable facilities are not attached to the UHF terminals on the back of the receiver (A., pp. 14a-15a). But it is the FCC, not the panel, that should assess such matters. *E.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Here the agency's assessment on A/B switches was quite different,[21] and the facts are by no means as

[21] In denying the Turner petition, the FCC said its "extensive experience" indicated that "even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability" (A., p. 71a).

simple as the panel assumed them to be.[22]

The panel's free-wheeling assessment of factual issues even results in its reliance on inconsistent factual assertions. Thus, to bolster the claim that the rules seriously impair the editorial discretion of cable operators, the lower court cites trade press data indicating that cable channel capacity is rather limited (A., p. 10a & n. 9). Yet, in the same breath, to support the contention that the so-called scarcity rationale is inapplicable to cable, the panel embraces assertions in the academic literature that cable has "almost infinite" channel capacity (A., pp. 9a-10a & n. 8, 30a-31a).[23]

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[22]For example, an A/B switch will *not* suffice to circumvent cable reception whenever the homeowner has a video cassette recorder attached to the television receiver, or the receiver is a so-called "cable ready" model. VCRs and "cable ready" television receivers, both of which are in increasingly widespread use today, were ignored in the lower court's analysis of the facts. Further, the UHF terminals at the rear of most receivers provide no solution to the difficulty of obtaining good picture quality for a local UHF station with only a six-inch "loop" antenna that typically is sold with the receiver, so that it is simply fatuous to say that those terminals substantially mitigate the obstacles cable creates for any UHF station that the system declines to carry.

[23]The panel's treatment of the scarcity rationale is also unpersuasive. Under long established FCC rules, no one person may own (and thereby control the content of) two or more television stations serving the same area; but under the panel's decision a single cable operator not only controls all of the channels delivered by the system (whether it be 12 or 200 channels) but also is immune under the First Amendment from must-carry regulations designed to insure that the cable operator does not block or impede the subscribers' access to local broadcast stations.

Perhaps recognizing its vulnerability on the scarcity question, the panel opinion goes on to consider — without the slightest basis in the agency's findings for doing so — whether cable television has the attributes of a natural monopoly. (A., pp. 32a-33a.) The panel thinks not, but admits its view on this question conflicts with Judge Posner's decision in Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); to justify its rejection of *Omega*, the panel relies on an academic article written 12 years earlier by then Professor Posner. (*Id.*) Other more recent commentators express little doubt on the natural monopoly point. *Cf.* 1 C. Ferris, F. Lloyd, T. Casey, *Cable Television Law* ¶ 13.15[3] at 13-95 (1985) ("there seems little reason to give an enforceable legal monopoly to a cable operator who may already have a *de facto* natural economic monopoly"), and authorities cited therein.

More importantly, the lower court's opinion treats the issue of potential adverse economic impact as the sole basis and purpose of the must-carry rules (A., pp. 13a-16a). However, that simply is not so, as the agency's 1965 and 1966 rulemaking decisions demonstrate. *See* p. 3, *supra*. The policies of assuring that the access of cable subscribers to local stations is not impeded, of insuring that cable does not inflict a competitive disadvantage on local station A vis-a-vis local stations B and C by carrying only the latter, and of creating rights to carriage (and to nonduplication of network programs) to offset the unfair competitive advantage cable enjoys from not having to bargain for the right to use the programs of broadcast stations, are not in any way dependent on a threat of serious economic injury to broadcasting.

The panel professes an inability to appreciate the interrelationship between FCC regulatory and copyright issues (A., pp. 41a-42a, n. 42). However, Congress has not overlooked that interrelationship.[24] The panel's cavalier dismissal of the interrelationship of the copyright and regulatory issues leads to its conclusion that the must-carry rules favor one class of

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[24]Section 624(f)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 544(f)(2), takes great care not to disrupt the FCC rules declared unconstitutional by the decision below. *See* Report of Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 70 (1984). As the Senate Committee explained,

> Given the current compulsory licensing scheme for cable systems under the copyright laws, if the "must carry" rules were eliminated, local cable operators might not carry some local broadcast stations, or would be in a position to charge an unreasonable price to let a broadcaster on their systems.
>
> The committee recognizes the importance of local programing [*sic*] and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately be found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing 'must carry' rules to protect the public interest. Of course, the FCC may need to update these rules to resolve problems that may arise.

S. Rep. No. 98-67, 98th Cong., 1st Sess. 11-12 (1983).

conclusion that the must-carry rules favor one class of "speakers" (local broadcasters) over another (cable programmers) (A., p. 36a). That conclusion fails to take into account the critical fact that the copyright laws do the same thing, only in reverse.[25]

Finally, with a full-fledged rulemaking directed at the issues of concern to the lower court, the panel might not have erroneously concluded that the FCC's extensive analyses of the need for restrictions on cable television importation of distant broadcast signals indicate that the must-carry rules serve no legitimate purpose. The fact is that the decision to repeal the distant-signal rules was very largely predicated on the assumption that UHF stations would benefit from cable carriage, and that this benefit would very largely offset the impact of distant-signal importation. *E.g.*, *CATV Syndicated Program Exclusivity Rules*, 79 F.C.C. 663, 745, 891 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

Without must-carry rules, the assumption that UHF stations will reap benefits from being carried on cable loses all validity.

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[25]By making cable usage of the product of cable programmers subject to normal copyright liability, while giving cable systems a compulsory copyright license to retransmit broadcast signals, the current Copyright Act "discriminates" in favor of cable programmers by giving them the ability to withhold programming from cable, and thus the basis from which to negotiate a reasonable accommodation with cable systems.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 23, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 83-1283

QUINCY CABLE TV, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*

KHQ, INCORPORATED,
SPOKANE TELEVISION, INC.,
KING BROADCASTING COMPANY,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS,
NATIONAL ASSOCIATION OF BROADCASTERS,
TOWN OF QUINCY, WASHINGTON,
Intervenors

AND CONSOLIDATED CASE No. 83-2050

ORDER

[Filed July 19, 1985]

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

George A. Fisher
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1283

QUINCY CABLE TV, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

KHQ, INCORPORATED,
SPOKANE TELEVISION, INC.,
KING BROADCASTING COMPANY,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS, and
TOWN OF QUINCY, WASHINGTON, INTERVENORS

No. 83-2050

TURNER BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC.,
COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.,
BLACK ENTERTAINMENT TELEVISION,

NATIONAL RELIGIOUS BROADCASTERS,
TELEVISION LICENSEES,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF BROADCASTERS,
SPANISH INTERNATIONAL COMMUNICATIONS
CORPORATION *et al.*,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
COLUMBUS BROADCASTING COMPANY, INC. *et al.*,
KING BROADCASTING COMPANY,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
MCGRAW-HILL BROADCASTING COMPANY, INC. *et al.*,
NATIONAL BROADCASTING COMPANY, INC.,
STATION REPRESENTATIVES ASSOCIATION,
TAFT TELEVISION AND RADIO COMPANY, INC., and
MARANATHA BROADCASTING COMPANY, INC., INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

Argued April 16, 1985

Decided July 19, 1985

John P. Cole, Jr., with whom *David M. Silverman* was on the initial and supplemental briefs, for Quincy Cable TV, Inc., petitioner in No. 83-1283. *Mr. Cole* also entered an appearance for Town of Quincy, Washington, intervenor in No. 83-1283.

Bruce D. Sokler, with whom *Charles D. Ferris*, *Frank W. Lloyd*, and *L. Gregory Ballard* were on the brief, for Turner Broadcasting System, Inc., petitioner in No. 83-2050.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, for respondents in Nos. 83-1283 and 83-2050. *Bruce E. Fein*, then General Counsel, Federal Communications Commission, was on the initial brief for respondents in No. 83-1283 and on the brief for respondents in No. 83-2050. *Gregory M. Christopher*, Attorney, Federal Communications Commission, was on the intial brief for respondents and the Supplemental Brief for Respondents, Intervenors, and Amici Curiae pursuant to Court Order of October 16, 1984 in No. 83-1283, and entered an appearance for respondent Federal Communications Commission in No. 83-2050. *Robert G. Nicholson* and *Margaret G. Halpern*, Attorneys, Department of Justice, were on the initial brief for respondents and the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283, and on the brief for respondents in No. 83-2050. *J. Paul McGrath*, Assistant Attorney General, was on the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283 and on the brief for respondents in No. 83-2050. *Jack D. Smith*, General Counsel, Federal Communications Commission, was on the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283. *Jane E. Mago* and *C. Grey Pash, Jr.*, Attorneys, Federal Communications Commission, entered appearances for respondent Federal Communications Commission in No. 83-2050.

J. Laurent Scharff, with whom *James M. Smith* was on the initial and supplemental briefs in No. 83-1283 and on the brief in No. 83-2050, for Association of Independent Television Stations, Inc. and National Association of Broadcasters, intervenors in Nos. 83-1283 and 83-2050, and for Association of Maximum Service Telecasters, Inc., McGraw-Hill Broadcasting Company, Inc., Metromedia, Inc., National Broadcasting Company, Inc., and Taft Television and Radio Company, Inc., intervenors in No.

83-2050. *Jonathan D. Blake, Paul J. Berman,* and *Gregory M. Schmidt* entered appearances for intervenor Association of Maximum Service Telecasters, Inc. *Arthur B. Goodkind* and *Mary M. Hendriksen* entered appearances for intervenors McGraw-Hill Broadcasting Company, Inc. *et al. Howard Monderer* entered an appearance for intervenor National Broadcasting Company, Inc. *Erwin G. Krasnow* and *Michael D. Berk* entered appearances for intervenor National Association of Broadcasters.

Arthur Stambler, Erwin G. Krasnow, Michael D. Berg, Edward W. Hummers, Jr., and *David G. Rozzelle* were on the brief for Spokane Television, Inc., intervenor in No. 83-1283, and National Association of Broadcasters and King Broadcasting Company, intervenors in Nos. 83-1283 and 83-2050.

R. Russell Eagan was on the brief for KHQ, Incorporated, intervenor in No. 83-1283.

John Geoffrey Bentley was on the brief for Maranatha Broadcasting Company, Inc., intervenor in No. 83-2050. *Laura Metcoff Klaus* entered an appearance for this intervenor.

Norman P. Leventhal, Meredith S. Senter, Jr., and *Barbara K. Kline* were on the brief for Spanish International Communications Corporation *et al.*, intervenors in No. 83-2050.

Stephen R. Effros was on the brief for Community Antenna Television Association, Inc., intervenor in No. 83-2050.

Debra Lee Carter was on the brief for Black Entertainment Television, intervenor in No. 83-2050. *Steven Reed* entered an appearance for this intervenor.

Brenda L. Fox, Carol A. Melton, Robert St. John Roper, and *Michael S. Schooler* were on the brief for Na-

tional Cable Television Association, Inc., intervenor in No. 83-20[illegible]0.

Baryn S. Futa and *Susan Dillon* were on the brief for Corporation for Public Broadcasting and National Association of Public Television Stations, intervenors in No. 83-2050.

Edward W. Hummers, Jr., *David G. Rozzelle*, and *Robert A. DePont* entered appearances for King Broadcasting Company, intervenor in Nos. 83-1283 and 83-2050.

Lawrence A. Horn, *Nancy H. Hendry*, *Eric H. Smith*, and *Lewis J. Papers* were on the brief for Corporation for Public Broadcasting *et al.*, *amici curiae* in No. 83-1283, urging affirmance. *Robert S. Blacher* entered an appearance for these *amici*.

Daniel J. Popeo and *Michael P. McDonald* were on the brief for American Legal Foundation, *amicus curiae* in No. 83-2050, urging reversal.

Before WRIGHT, GINSBURG, and BORK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: FCC regulations require cable television operators,[1] upon request and without compensation, to transmit to their subscribers every over-the-air

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[1] The terms "cable television operator" or "cable system" refer to the entity that physically delivers video signals via coaxial cable into the homes and offices of its paying subscribers. A "cable programmer," in contrast, is an independent service that provides cable operators with programming to transmit over their systems. For cable programmers to reach their intended audience they must obtain access to a channel on a cable system. Typically, most of a cable operator's viewing fare consists of programming provided by cable programmers and retransmission of local over-the-air broadcast signals. *See* note 2 *infra*.

television broadcast signal [2] that is "significantly viewed in the community" or otherwise considered local under the Commission's rules. 47 C.F.R. §§ 76.57-76.61 (1984). Alleging that these mandatory carriage or "must-carry" rules violate the First Amendment rights of cable programmers, cable operators, and the viewing public, Turner Broadcasting Systems, Inc. (TBS), the owner of a variety of cable services,[3] petitioned the FCC to institute rulemaking procedures to delete the offending regulations.[4] Although acknowledging that the challenged rules deprive cable programmers of access to some audienes and "compel carriage of broadcast signals in place of alternate programming that subscribers, if given a choice, might otherwise choose," the Commission denied TBS's petition. *Memorandum Opinion and Order*, FCC 84-136, April 6, 1984 (hereinafter *Opinion and Order*), at 3, Joint Appendix to No. 83-2050 (*Turner* JA) at 3. TBS now petitions for review of that denial. In a separate action, Quincy Cable Television, Inc. (Quincy), the operator of a cable system in Quincy, Washington, petitions for review of an FCC order requiring it to

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[2] The term "broadcast television" refers to conventional commercial or public television, the signals of which are transmitted "over the air" to the viewer's television set.

[3] Among TBS's many holdings are Cable News Network (CNN) and CNN Headline News. CNN provides 24-hour news programming and is currently available on over 4,800 of the nearly 6,200 operational cable systems across the country. SATELLITE SERVICES REPORT, May 1984, *reproduced as* Appendix to brief for National Cable Television Association, Inc., intervenor in No. 83-2050. CNN Headline News, currently picked up by 1,200 cable systems, provides continuous summaries of national and international news. *Id.*

[4] Petition for Rulemaking filed by Turner Broadcasting System, Inc., October 15, 1980, Joint Appendix to No. 83-2050 (*Turner* JA) at 5-17.

carry the signals of several local broadcast stations and imposing a $5,000 "forfeiture" for its failure to do so.[5]

In the course of reviewing those petitions, we have concluded and now hold that the must-carry rules are fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand.

I. Background

The Supreme Court has repeatedly stressed that "[e]ach medium of expression * * * must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion). Mindful that in applying the broad principles of the First Amendment to new media we must remain sensitive to the "differing natures, values, abuses and dangers" of each method of expression, *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), we examine in detail the nature of cable television technology, the history and purposes of the FCC's regulation of that technology, and prior judicial assessments of the constitutionality of that regulation.

A. *Cable Television Regulation and the Origins and Purposes of the Must-Carry Rules*

1.

Cable television and ordinary commercial broadcast television operate on the basis of wholly different techni-

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[5] Although the cases come to us in different procedural postures, Quincy and TBS mount virtually identical First Amendment challenges. Accordingly, we find it the most efficient course to consolidate the petitions on our own motion and address the constitutionality of the must-carry rules in the same opinion.

cal and entrepreneurial principles. *See generally Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2701 (1984). Conventional broadcasters radiate electromagnetic waves from a transmitting antenna. The waves are intercepted by the viewer's television receiver, typically via a rooftop antenna, and decoded to produce a video image. Broadcasters derive their revenues not by selling the signal to the viewer but by selling time to advertisers.[6] As a general rule, the larger the audience the greater the rate the broadcaster can charge.

In contrast, cable operators charge subscribers a fee for the right to view programming from a variety of broadcast and non-broadcast sources.[7] Although cable systems frequently have the capacity to originate programming, most of their viewing fare consists of retransmission of signals generated by independent entities. Typically, the system offers local over-the-air broadcast signals captured by a strategically located master antenna, distant broadcast signals, which are often imported via satellite, and non-broadcast signals transmitted exclusively to cable systems by satellite or microwave relay. The cable operator converts the signal received from these or other sources into an electronic impulse and delivers it to subscribers' homes over a coaxial cable. Because the cable signal reaches the home by wire and not via the physically limited electromagnetic spectrum, cable systems have the potential, often unrealized, to transmit many more signals than the

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[6] In contrast to commercial broadcasters, public broadcasting stations derive their operating revenues from grants and contributions.

[7] Cable programmers derive revenues in a variety of ways. Many charge the cable systems that transmit their programming a small fee per subscriber. A few charge the subscriber a monthly fee in addition to that owed to the operator for basic cable service. Finally, a substantial number of cable programmers sell advertising time. *See* SATELLITE SERVICES REPORT, *supra* note 3.

airwaves can support. Some new or recently upgraded systems have the capacity to offer more than 100 channels.[8] More currently operational systems, however, can carry far fewer, typically from 12 to 36.[9]

Although initially reluctant to exercise jurisdiction over cable, by the mid-1960's the FCC had changed its position and undertook comprehensive regulation of the budding industry. *See generally United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (canvassing early history of FCC regulation of cable); D. LE DUC, CABLE TELEVISION AND THE FCC (1973). Fully recognizing that the statutory basis for its jurisdiction was far from explicit, the Commission nonetheless believed that oversight was imperative lest the "explosive" growth of the cable industry undermine the regulatory framework already established for ordinary broadcast television. *Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895*, 38 FCC 683, 685, 697-716 (1965) (*First Report and Order*); *CATV, Second Report and Order in Docket No. 14895*, 2 FCC2d 725 (1966) (*Second Report and Order*).

The Commission's objective was not merely to protect an established industry from the encroachment of an upstart young competitor, although such a result was clearly the byproduct of the regulatory posture that de-

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[8] The Commission suggests that some currently operational systems have the capacity for 200 channels. Brief for respondents in No. 83-2050 at 4. *See also* Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976) (*Electronic Newspaper*) (describing potential channel capacity as "almost infinite").

[9] Despite the widely held notion that cable systems have a virtually unlimited channel capacity, 38.7% of such systems have fewer than 20 channels. *Communications Daily*, June 1, 1984, at 4. Indeed, 12.4% of cable subscribers are served by systems with 12 or fewer channels. Brief for respondents in No. 83-2050 at 38 n.27, *citing Television and Cable Factbook*, Cable & Services Volume at 1726 (1984).

veloped.[10] Rather, the Commission took the position that without the power to regulate cable it could not discharge its statutory obligation to provide for "fair, efficient, and equitable" distribution of service among "the several States and communities." 47 U.S.C. § 307(b) (1982). *See First Report and Order*, 38 FCC at 699; *Second Report and Order*, 2 FCC2d at 734-737. If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest. In particular, if an unregulated, unlicensed cable industry were to threaten the economic viability of broadcast television, the Commission would be powerless to effect what it saw (and continues to see) as one of its cardinal objectives: the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 (1968), *quoting* H.R. Rep. No. 87-1559, 87th Cong., 2d Sess. 3 (1962).

2.

Almost from the beginning, the must-carry rules were a centerpiece of the FCC's efforts to actively oversee the growth of cable television.[11] Then, as now, the ap-

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[10] Some analysts have taken a harsher view of the FCC's early regulatory posture. *See, e.g.*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 22 (1984) ("FCC policies in [the] 1960s and early 1970s unfairly inhibited the growth and development of cable."); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 40 (1976) ("There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.").

[11] The Commission first sought to impose a must-carry requirement in 1962 as a condition for granting an application

plicability of the rules varied according to such factors as the quality of the broadcast signal available in the community. In general, however, the rules required cable operators, upon request, to carry any broadcast signal considered local under the Commission's complex formula.[12] Affected parties could petition for a waiver from their must-carry obligations,[13] but the rules themselves

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to construct a microwave system to transmit distant signals to a rural cable system. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). In 1965 the requirement was applied to all microwave-fed systems. *First Report and Order*. A year later the FCC extended mandatory carriage obligations to all cable systems that carried at least one broadcast signal regardless of the means used to obtain that signal. *Second Report and Order*.

[12] For the current formulation, *see* 47 C.F.R. §§ 76.5 76.51, 76.53, 76.55, 76.57, 76.59, 76.61 (1984). In general, the rules require a cable system to carry the signals of all commercial television stations within 35 miles of the community served by the system, other stations in the same television market (as designated by the Commission), and all stations "significantly viewed in the community." The rules vary according to the size of the market in which the cable system is located. Quincy, Washington, for example, is considered to be "outside all major and smaller television markets." Accordingly, it was subject to 47 C.F.R. § 76.5.

Until recently a cable operator's must-carry obligation arose only if it elected to transmit at least one broadcast signal. *See* 47 C.F.R. § 76.5(a). Under the Commission's newly revised definition, however, carriage of local stations is mandatory even if the operator otherwise carries no broadcast signals. *See Report and Order*, FCC 85-179, April 11, 1985, at 7, 10. Ironically, under the revised approach cable systems that carry only broadcast signals will not be subject to the must-carry rules. *Id.*

[13] The current waiver provision is codified at 47 C.F.R. § 76.7. In general, the Commission has granted waivers extremely sparingly. For a rare example, *see Group W Cable Inc.*, 57 Rad. Reg. (P&F) 637, 640 (1984). *See generally In the Matter of Rules and Regulations With Respect to "Sat-*

drew few lines. They required carriage of every local or significantly viewed signal irrespective of the number of must-carry channels already being transmitted, the degree of programming duplication, or the channel capacity of a cable system.

Although the economic analysis initially advanced in support of the must-carry rules was somewhat complicated, the Commission's general objective was straightforward: to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television. If cable were to "drive out television broadcasting service," the Commission reasoned, "the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain." *First Report and Order*, 38 FCC at 700. The must-carry rules, together with a comprehensive body of related regulations, would channel the development of the nascent cable industry to limit the risks it might pose to conventional broadcasting, "society's chosen instrument for the provision of video services." *Inquiry Into the Economic Relationship Between Broadcasting and Cable Television*, 71 FCC2d 632, 644 (1979) (*Economic Inquiry Report*).

At the time of the initial promulgation of the rules, the Commission acknowledged that it had insufficient data to "predict with reliability" the extent of the risk posed by cable. *First Report and Order*, 38 FCC at 711. *See also Second Report and Order*, 2 FCC2d at 744-745. But the economic analysis posited by the broadcasting industry (and now espoused by the Commission [14])

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urated" Cable Television Systems, 66 FCC2d 710, 713-714 (1977) (*Saturated System Rulemaking*) (absent a "compelling showing" waiver will not be granted even if mandatory carriage obligations result in deletion of discretionary signals).

[14] Brief for respondents in No. 83-2050 at 6.

painted a dire picture. *First Report and Order*, 38 FCC at 689. The profitability of local commercial television is dependent on advertising revenues, which in turn are dependent on the number of viewers in the audience. Self-evidently, an advertiser will pay less per unit of air time as viewership decreases. If a significant percentage of viewers subscribe to cable *and* if subscribers view cable to the exclusion of broadcast television, the audience will become fragmented. "A gain of a subscriber to the [cable] system will in most cases mean the effective loss of a potential viewer for the local station." *Id.* at 703. With access to a smaller (often less affluent) market, advertisers will pay less for air time and profits will decline, a consequence that both discourages others from seeking a broadcast license and, in the extreme case, might even result in financial failure of some existing stations. Only if local broadcasters were assured access to the whole of their allocated audience, the FCC believed, could the risk of audience fragmentation and the concomitant threat to free, local television be forestalled.

A central premise of this analysis was that a significant proportion of cable subscribers would cease to view local television unless such signals were carried by the cable system. At first blush, as the cable industry vigorously pointed out, this assumption was somewhat counterintuitive. Almost without exception, the must-carry rules only mandate carriage of signals that can already be picked up off the air.[15] Although the cable attaches to the television set through the VHF outlet, an inexpensive switch (the "A/B switch") would enable a viewer

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[15] *But see Amendment of the Commission's Rules Regarding Major Television Markets*, 50 Fed. Reg. 2565, 2568-2569 (Jan. 17, 1985) (to be codified at 47 C.F.R. § 76.51); *see also* 57 Rad. Reg. (P&F) 1061 (dissenting statement of Commissioner Patrick).

to alternate between cable and off-air VHF signals.[16] Indeed, connection of the cable typically has no direct effect at all on receipt of UHF signals.[17] Thus, in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules. If that were the case, cable's gain would not necessarily mean broadcast television's loss, and the Commission's reasoning would be deprived of its major premise.

But, as the FCC pointed out when it first enacted the rules, the technical availability of off-air signals does not necessarily defeat the assumption that without the must-carry rules a significant number of cable subscribers might curtail their viewing of local broadcast television. Even so minor a task as flicking an A/B switch, the Commission suggested, "is an obvious deterrent to its use." *First Report and Order*, 38 FCC at 702. Moreover, with or without a switch local signals are available to the subscriber only if the antenna remains attached. Yet, the Commission observed, one of the main selling points of cable is the prospect of dispensing with unsightly or expensive antennas. *Id.* at 702 n.25. Finally, even if the antenna remains in place, cable retransmission of UHF signals usually provides a far clearer picture than is available off-air. Thus, the Commission suggested, without the benefit of must-carry UHF stations would be at a significant competitive disadvantage. *Economic Inquiry Report*, 71 FCC2d at 713; *see also Cable Television Program Syndicated Exclusivity*

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[16] One version of the switch is currently available for $4.95. *Turner* JA at 124.

[17] *See* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 144 (1983) (CABLESPEECH); *Petition of Quincy Cable TV, Inc. dated November 19, 1979, reproduced in* Joint Appendix to No. 83-1283 (*Quincy* JA) at 13.

Rules, 79 FCC2d 663, 718 (1980) (*Syndicated Exclusivity Rules.*)

In sum, at the time of their original promulgation the Commission viewed the must-carry rules as critical stones in the regulatory bulwark erected to guard against destruction of free, community-oriented television. By forcing cable systems to carry local and significantly viewed broadcast signals, the Commission sought to channel the growth of cable in a manner consistent with the public's interest in the preservation of local broadcasting.

3.

When it first promulgated the must-carry rules in the mid-1960's, the Commission recognized that it could not prove the factual predicates of its analysis. Although frankly relying on its "collective instinct" and "intuition," *Inquiry Into Economic Relationship Between Television Broadcasting and Cable Television*, 65 FCC2d 9, 14 (1977) (*Notice of Inquiry*), it concluded that it would be inconsistent with its responsibilities to "withhold[] action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled—i.e., by waiting 'until the bodies pile up' before conceding that the problem exists." *First Report and Order*, 38 FCC at 701.

In the ensuing years the Commission has repeatedly repromulgated and fine-tuned the must-carry rules. *See Commission Proposals for Regulation of Cable Television*, 31 FCC2d 115, 118-120 (1971); *Cable Television Report and Order*, 36 FCC2d 143, 173-176 (1972). It has, however, never reconsidered or seriously questioned the elaborate and concededly speculative premises on which its economic defense of the rules rests.[18]

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[18] The Commission acknowledged as much in its order denying TBS's petition. *Opinion and Order, Turner* JA at 3. However, fundamentally inverting the burden of justification

This approach is in sharp contrast to the Commission's treatment of several other components of the regulatory framework imposed in the early years of its regulation of cable television. After conducting a comprehensive economic analysis based on a detailed and highly sophisticated examination of a number of discrete television markets, the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules.[19] Like the must-carry rules, the deleted regulations were originally promulgated to protect broadcast television from competition from the expanding cable industry. *See Economic Inquiry Report; Syndicated Exclusivity Rules* (deleting syndicated-exclusivity and distant-signal rules).

In the context of this wide-ranging deregulatory effort, the Commission acknowledged a radical shift in its perception of the role of cable in the array of viewing options available in a given community. Abandoning its initial view of cable as an auxiliary service that merely supplemented broadcasting by improving reception in outlying areas, the Commission now recognized cable as a legitimate, independent vehicle for providing alternative video services to the public. *Economic Inquiry Report*, 71 FCC2d at 645-646. With respect to the specific question of the continued value of the distant-signal and

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for regulations that impinge on First Amendment freedoms, the Commission faulted TBS for its failure to provide economic data on the possible effect of deleting or modifying the rules.

In the *Second Report and Order* the Commission did look at studies suggesting, for example, a general pattern of growth in the number of homes served by cable. 2 FCC2d at 738-744. But, because of their incompleteness, the Commission concluded that such studies were of "limited value." *Id.* at 744.

[19] The distant-signal rules limited the number of distant signals a cable operator could import into its market. The syndicated-exclusivity rules limited the carriage of particular programs on those imported distant signals. *See generally Cable Television Report and Order*, 36 FCC2d at 170-185.

syndicated-exclusivity rules, the Commission found that its general economic analysis had failed to substantiate the intuitive fears on which the rules had been premised since the mid-1960's.

> Upon examination of the economic evidence, we conclude that competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies. * * * [A]udience losses attributable to increased competition from cable television take place in a context of offsetting factors. Increases in population and in the level of economic activity result in a fairly steady growth in the demand for advertising exposures and in station revenues. Thus, the ability of stations to maintain existing levels of service to their communities is likely to be unimpaired in the absence of our distant signal carriage rules.

Id. at 661. Stating that the comprehensive nature of its analysis enabled it to speak "with a clarity[] which is uncommon in matters of public policy," the Commission found that "continued regulatory intervention is not merely unnecessary, it is counterproductive." *Id.* at 659.

B. *Prior Constitutional Challenges to Cable Regulations*

On several occasions the Supreme Court has addressed questions concerning the breadth of the FCC's jurisdiction over cable television. *See United States v. Southwestern Cable Co., supra,* 392 U.S. at 178 (generally approving FCC jurisdiction over cable if "reasonably ancillary" to its regulation of broadcast television); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest I*) (finding rule requiring cable operators to originate local programming within FCC's jurisdiction); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest II*) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access). *See also Capital Cities Cable, Inc. v. Crisp, supra,* 104 S.Ct. 2694 (discussing federal

preemption of state laws regulating cable). However, in marked contrast to the extensive First Amendment jurisprudence developed in the context of the broadcast media, *see, e.g., FCC v. League of Women Voters of California*, 104 S.Ct. 3106 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court has never confronted a challenge to the constitutional validity of the must-carry rules or any other regulation affecting cable television.[20]

In the lower federal courts questions concerning the constitutionality of various cable regulations arose almost from the first moment the Commission asserted its regulatory jurisdiction over the industry. The initial challenges, which were brought when cable was in its infancy and apocalyptic visions of its impact were common, met with little success. *See, e.g., Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187 (3d Cir. 1968); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967); *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert denied*, 375 U.S. 951 (1963).

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[20] In *Southwestern Cable* the Court explicitly disclaimed reaching any question concerning the validity of the FCC's cable rules. 392 U.S. at 167. In *Midwest I* the plurality opinion suggested in a footnote that the Eighth Circuit had correctly upheld the validity of several cable regulations. 406 U.S. at 659 n.17. However, the context of the reference makes clear that the plurality meant to suggest merely that the Eighth Circuit had correctly held that the particular rules at issue were within the standard set out in *Southwestern Cable* for testing the reach of the FCC's jurisdiction. In any event, as the *Midwest II* Court later acknowledged, the plurality's footnote in *Midwest I* was pure "dicta." 440 U.S. at 697 n.7. Indeed, the *Midwest II* Court, though not reaching any constitutional questions implicated by the particular regulations before it, described those questions as "not frivolous." 440 U.S. at 709 n.19.

These decisions took one of two paths to dispose of the cable operators' First Amendment contentions, often in a single brief paragraph. The most common approach was simply to treat cable and broadcast television as indistinguishable for purposes of First Amendment analysis. Because it was well established that broadcast media could be subject to regulation far more intrusive than the First Amendment would tolerate in other contexts, it naturally followed for these courts that cable regulation, a variant on the same theme, should be subject to no more exacting scrutiny. *See, e.g., Black Hills Video Corp. v. FCC, supra,* 399 F.2d at 69 ("[i]t is irrelevant * * * that [cable] systems do not themselves use the airwaves"). Other courts undertook a somewhat more discriminating analysis. They upheld the regulations only after concluding that the restraint on speech was no greater than was reasonably required to serve the important interest of preserving local broadcasting. *Buckeye Cablevision, Inc. v. FCC, supra,* 387 F.2d at 225.

In recent years the lower federal courts have subjected FCC regulation of cable television to a far more rigorous constitutional analysis. It is now clearly established, for example, that cable operators engage in conduct protected by the First Amendment. *See, e.g., Tele-Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985); *Midwest Video Corp. v. FCC,* 571 F.2d 1025, 1052-1057 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979). Most of these courts, mindful of the Supreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression, have cautioned against reflexive invocation of the more forgiving First Amendment standards applicable to broadcast regulations. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1403; *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 44-45 (D.C. Cir.) (*per*

curiam), *cert. denied*, 434 U.S. 829 (1977).[21] Indeed, in *Home Box Office* this court noted that earlier cases that had considered the intersection of the First Amendment and cable television regulations had incorrectly relied on Supreme Court precedent developed in the context of regulation of the broadcast media. Of particular note, the court "rejected" by name the reasoning of the Eighth Circuit in *Black Hills Video Corp. v. FCC*, *supra*, the only court to have explicitly considered the constitutionality of the must-carry rules. 567 F.2d at 45 n.80.

At issue in *Home Box Office* were a number of FCC regulations limiting the programming fare a cablecaster[22] could offer its subscribers. The Commission de-

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[21] *But see Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

[22] Cablecasting refers to origination of programming on a cable television system either by the operator itself or by entities that lease (or are given) channel space by a cable operator. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 17 n.2 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

The Commission suggests that *Home Box Office* is inapposite because the decision was confined to issues relating to non-broadcast programming. The argument is unavailing. We note first that TBS describes both CNN and CNN Headline News as "non-broadcast" services. Brief for petitioner in No. 83-2050 at 3. In any event, the *Home Box Office* court expressly repudiated the reasoning of decisions that had upheld the constitutional validity of regulations prohibiting transmission of distant *broadcast* signals. 567 F.2d at 45 n.80. With respect to *Black Hills Video*, the case relied on by the Commission in this controversy, the court stated: "To the extent that *Black Hills Video* stands for the proposition that the Commission in some sense 'owns' the broadcast spectrum and can condition use of the signals accordingly, it must be rejected." *Id.* Moreover, although the decision did suggest that the rationale justifying lesser First Amendment scrutiny for broadcast regulation (the "scarcity rationale") might retain some force in the context of granting a microwave *license* to a cable operator, it expressly did not suggest that the FCC's power over microwave radio links implied a constitutionally

fended the rules by suggesting that they were necessary to assure that the various forms of pay television, including cable, not degrade the quality of programming on conventional broadcast television. As in the present controversy, the Commission suggested that the competitive injury to broadcasters would be felt most acutely by those who could not afford the more expensive video services.

The court rejected the FCC's argument and sustained the First Amendment challenge. Concluding that the regulation should be treated as an incidental burden on speech, the court applied the test announced by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Thus the regulations would be valid only if they served a substantial governmental interest and were no more intrusive than necessary to serve that interest. 567 F.2d at 48.

Measured against this standard, the court found the regulations wanting. They failed the first component of the test because the FCC had "not put itself in a position to know" whether its fears about the effect of cable television on local broadcasting were "real or merely * * * fanciful." *Id.* at 50. The regulations failed to clear the second *O'Brien* hurdle because they were "grossly overbroad," indiscriminately limiting the programming of cable systems whether or not the limits in fact served to protect the interests the rules purported to serve. *Id.* at 51.

In sum, the Supreme Court has never addressed the constitutional validity of the must-carry rules or of any of the analogous FCC regulations affecting cable television. To the extent the Court has considered the issue

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permissible authority over cable generally. Indeed, in its general discussion of the inapplicability of the scarcity rationale to cable the court drew no distinction among the various sources of signals ultimately transmitted to the subscriber. 567 F.2d at 44-45.

at all, it has described the question as "not frivolous." *Midwest II*, 440 U.S. at 709 n.19. In the lower federal courts the initial trend was to sustain the regulations against First Amendment and due process challenges. In recent years, however, the courts have subjected governmental regulation of cable to far more exacting constitutional scrutiny. The 1977 decision in *Home Box Office* suggested that FCC regulation of cable could withstand analysis under the First Amendment only if the Commission proved that the regulation burdened speech only incidentally, served an important governmental interest, and was no broader than necessary to further that interest.

C. *The TBS and Quincy Petitions*

1. *TBS.* In 1980 TBS petitioned the FCC to institute rulemaking to consider deleting the must-carry rules. *Petition For Rulemaking To Delete The Cable "Must Carry" Rules*, October 15, 1980, *Turner* JA at 5-17. In support of its petition TBS argued that the regulatory environment had changed substantially since the original promulgation of the rules and that the factual premises and economic assumptions on which the rules were premised had long since been disproved or abandoned. *Id.* at 6-11. In addition, it suggested that the must carry-rules could not survive the constitutional test set out in *Home Box Office*. *Id.* at 11-16.

TBS's economic grievance was straightforward. As a cable *programmer*, TBS is in the business of selling a package of programming to the independent cable *operators*, who actually deliver the cable signal in the communities they are franchised to serve.[23] If, because of the must-carry rules, a significant number of a cable operator's channels are occupied by the signals of local

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[23] *See* notes 1 & 7 *supra*. For both CNN and CNN Headline News the cable operator pays a small charge per subscriber. SATELLITE SERVICES REPORT, *supra* note 3.

broadcasters, programmers will face artificially stiff competition for the limited number of channels that remain available for non-mandatory transmissions. If the cable system is "saturated" with must-carry signals, a phenomenon recognized by the Commission, the rules operate to deprive programmers of any opportunity at all to sell their services.[24]

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[24] In light of this injury, TBS clearly has standing to raise this claim. In numerous petitions for waiver from the force of the must-carry rules, cable operators have expressly indicated that application of the rules would preclude carriage of TBS programming. *See, e.g.*, letter petition for waiver of Quincy Cable Co., *Quincy* JA at 37-40; supplemental brief for petitioner in No. 83-1283 at 6 (indicating that application of must-carry rules would prevent carriage of CNN altogether or force the operator to relegate CNN to another, more expensive tier of channels accessible to substantially fewer subscribers). Denial of those waiver petitions, *see, e.g., In re Quincy Cable TV, Inc.*, 89 FCC2d 1128 (1982), *Quincy* JA at 12, necessarily results in significant injury to TBS, injury that is easily sufficient to constitute "injury in fact." The injury is especially acute in the case of systems "saturated" with must-carry signals. *See* brief for respondents in No. 83-2050 at 38 n.27 (acknowledging existence of saturated systems). *See also Saturated System Rulemaking*, 66 FCC2d at 710-714. In those circumstances, the operator could not possibly purchase any TBS programming.

While, of course, it cannot be said with absolute certainty that invalidation of the must-carry rules would redress this economic injury—a cable operator might still elect not to purchase any TBS programming—certainty is not a constitutional prerequisite. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (injury must be *"fairly"* traceable to the challenged action and *"likely* to be redressed by a favorable decision") (emphasis added); *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984). Where, as here, TBS can point to assertions by cable operators that, but for the must-carry rules, they would carry its programming, we have no doubt that the likelihood that the injury would be redressed by a favorable decision is sufficiently high to confer standing. In any case, the Supreme Court has recognized that a plaintiff

The TBS petition fell into something of a black hole. Although extensive comments were filed by interested members of the broadcast and cable industry, the FCC took no action. On March 21, 1983 TBS filed a *Petition for Expedited Consideration*, *Turner* JA at 43, again contending that the First Amendment as well as general principles of administrative law required reevaluation of the rules. When that petition too elicited no response, TBS sought review in this court, requesting that we compel the Commission to institute rulemaking or, at least, respond to its petition. Just before its brief was due the Commission moved the court to remand the record so that it could act on the TBS petition. On March 23, 1984 that motion was granted.

Two weeks later the Commission issued a three-page memorandum order in which it formally denied the petition for rulemaking. *Opinion and Order*, *Turner* JA at 1-4. Its First Amendment analysis was limited to a single, unadorned citation to the Eighth Circuit's decision in *Black Hills Video Corp. v. FCC*, *supra*. The Commission acknowledged that the rules were "intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose" and that the rules place cable programmers "on an unequal footing" because they "take[] cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use." *Turner* JA at 3. Nonetheless, it concluded that TBS had failed to demonstrate that the countervailing interest of protecting local television had ceased to justify continuation of the rules. Believing that rulemaking would be premature until "a more complete factual base," *id.*, were developed, the Commission denied TBS's petition.

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who has been entirely deprived of any opportunity to compete has standing to challenge the constitutionality of that deprivation. *Regents of University of California v. Bakke*, 438 U.S. 265, 280-281 n.14 (1978) (plurality opinion).

TBS now petitions for review of that denial, requesting, in the alternative, that we set aside the rule as unconstitutional or compel the Commission to institute rulemaking to reconsider the rules.

2. *Quincy.* Quincy operates a cable television system in Quincy, Washington, a small town approximately 125 miles equidistant from Seattle and Spokane. At the origin of this proceeding Quincy had a 12-channel capacity, and all 12 channels were in use. Exercising its editorial and commercial discretion, Quincy had elected to provide its subscribers with a channel that originated on the cable system itself, the signals of the three network affiliates in Seattle, the largely duplicative signals of the three network affiliates in Spokane, a Spokane-based public broadcasting station, and four other channels offering a wide variety of public affairs and entertainment programming. Of the 12 channels, only the four Spokane stations could be received without the benefit of cable.[25]

In 1979, after conducting a survey, Quincy came to believe that its subscribers would prefer to view three specialized cable programmers, including a 24-hour news service, instead of the three commercial Spokane stations. Although the three Spokane stations had not yet formally requested carriage (thus triggering Quincy's "must-carry" obligation), Quincy recognized that such a request would almost certainly follow the announcement of its intention to delete the three signals from its system. Accordingly, Quincy wrote the Commission and, in effect, petitioned for a partial waiver from the force of the rules. Letter from Quincy Cable TV, Inc. to Wil-

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[25] Because the Spokane signals originated over 125 miles away, viewers in Quincy could receive them in intelligible form only with the help of a UHF translator. A translator amplifies and rebroadcasts off-air signals and is common in areas in which direct reception is hindered by distance or intervening terrain barriers.

lard Nichols, Chief of FCC Cable Television Bureau, November 19, 1979, *Quincy* JA at 37.

In April 1980 the Cable Television Bureau of the FCC denied Quincy's waiver request. Letter from Willard Nichols, Chief of Cable Television Bureau, to Quincy Cable TV, Inc., April 28, 1980, *Quincy* JA at 1. Technically not under the compulsion of the must-carry rules until the Spokane stations requested carriage,[26] Quincy deleted two of the stations from its system. It then began a long series of administrative appeals of the waiver denial. At every stage Quincy advanced, and the Bureau rejected, the argument that the must-carry rules violated the First Amendment to the Constitution.[27] When Quincy continued to refuse carriage of the Spokane stations even after two of them formally requested carriage, the full Commission upheld the denial of the waiver and imposed a $5,000 "forfeiture." *Quincy Cable TV, Inc.*, 89 FCC2d 1128 (1982). Although Quincy did at that point reinstate the two Spokane stations, it continued to press its claim before the Commission. When the full Commission again upheld the imposition of the forfeiture, Quincy petitioned this court for review.

On the eve of oral argument the court learned of factual developments occurring during the pendency of

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[26] Although two of the stations requested carriage in the course of opposing the waiver, Quincy's must-carry obligations did not ripen until the expiration of the stay automatically granted during the pendency of a waiver petition. *See* 47 C.F.R. § 76.7(g). We do not address Quincy's contention that the Commission's construction of the automatic stay provision was erroneous.

[27] Quincy also contended that mandatory carriage of a broadcast signal constitutes a compensable taking under the Fifth Amendment. In light of Quincy's failure to allege damages, we read its takings argument to be an alternative ground for invalidating the rules. Because we find the rules infirm under the First Amendment, we need not and do not address Quincy's Fifth Amendment contentions.

the petition and remanded the case to the FCC for reconsideration in light of the changed circumstances.[28] *Quincy Cable TV, Inc. v. FCC*, 730 F.2d 1549 (D.C. Cir. 1984). On remand, the Commission ordered Quincy to supplement its filings. Believing that Quincy's supplementary submission served only to validate its earlier position, the Commission reaffirmed its decision to deny the requested waiver and impose a $5,000 forfeiture for failure to comply with the must-carry rules. This petition ensued.

II. The First Amendment: Standard of Review

The task of determining the appropriate standard of First Amendment review to apply to the must-carry rules requires us to address two distinct questions.[29] We begin

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[28] During the course of the lengthy proceedings before the Commission, Quincy had expanded its channel capacity. Although now willing to carry the Spokane signals, it objected to the requirement that it carry them on its "basic tier" of 12 channels, the only service taken by most of its subscribers. Although the record is not entirely clear, it appears that the Commission imposed the $5,000 fine while Quincy had a 12-channel capacity. Moreover, we note that the interference with Quincy's editorial autonomy, a value protected by the First Amendment, does not disappear with an increase in channel capacity. *See* note 41 *infra*.

[29] The parties do not contest our authority to consider the constitutionality of the rules in the context of reviewing the denial of Turner's petition for rulemaking. Nonetheless, because our jurisdiction is implicated, we briefly address the point. A petition for rulemaking cannot create jurisdiction in this court to adjudicate the legality of rules that would otherwise be unreviewable. However, because Turner had demonstrated ongoing injury from the enforcement of these regulations sufficient to confer standing, *see* note 24 *supra*, the constitutionality of the must-carry rules is properly before us, albeit in this unusual posture. Since the rules will never be enforced *directly* against Turner—but only against cable operators to whom Turner wishes to sell programming—this is the only opportunity Turner would have to raise these claims.

by evaluating whether First Amendment principles governing regulation of the broadcast media should also apply to regulation of cable television. Concluding that cable television warrants a standard of review distinct from that applied to broadcasters, we next consider whether the must-carry rules merit treatment as an "incidental" burden on speech and therefore warrant analysis under the balancing test set out in *United States v. O'Brien, supra*, 367 U.S. at 199. Although our review leaves us with serious doubts about the appropriateness of invoking *O'Brien*'s interest-balancing formulation, we conclude that the rules so clearly fail under that standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny.

A. *The Scarcity Rationale*

It has become something of a truism to observe that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 386. *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Tele-Communications of Key West, Inc. v. United States, supra*, 757 F.2d at 1338-1339. The suggestion is not that traditional First Amendment doctrine falls by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate the increasingly diverse mechanisms through which a speaker may express his view.

This sensitivity to the uniqueness of each medium precludes facile adoption of the First Amendment jurisprudence that has developed around challenges to FCC regu-

lation of broadcast television and radio. From the perspective of the viewer, no doubt, cable and broadcast television appear virtually indistinguishable. For purposes of First Amendment analysis, however, they differ in at least one critical respect. Unlike ordinary broadcast television, which transmits the video image over airwaves capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 or more channels.[30]

The distinction is of fundamental significance in light of the Supreme Court's oft-repeated suggestion that the First Amendment tolerates far more intrusive regulation of broadcasters than of other media precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum. *See, e.g., FCC v. League of Women Voters of California, supra,* 104 S.Ct. at 3116; *see also Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1403.[31] These limitations, the Su-

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[30] *See* note 8 *supra.*

[31] In one instance the Supreme Court did appear to look beyond spectrum scarcity to determine the appropriate standard against which to evaluate the constitutionality of a broadcast regulation. *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) (upholding FCC's power to regulate "indecent" speech broadcast over radio). *Pacifica's* holding, however, is extremely "narrow[]," *id.* at 750, and its reasoning has subsequently been limited to the particular circumstances of the case. *See Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 74 (1983). In addition, we note that several courts have held that *Pacifica's* rationale is inapposite in the context of cable television regulation. *See, e.g., Cruz v. Ferre,* 755 F.2d 1415, 1420-1421 (11th Cir. 1985) (focusing on cable subscriber's affirmative monthly decision to bring cable or a particular cable channel into his or her home and on the availability of a "lock box" to regulate viewing habits of children); *Community Television of Utah, Inc. v. Roy City,* 555 F.Supp. 1164 (D. Utah 1982).

preme Court observed early on, engender a peculiar irony of the broadcast medium: limited regulation, by converting aural and visual chaos into channels of effective communication, furthers rather than impedes the First Amendment's mission. "With everybody on the air," wrote Justice Frankfurter, "nobody could be heard. * * * [T]he radio spectrum is simply not large enough to accommodate everybody." *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-213 (1943). Without the imposition of some governmental control, "the cacophony of competing voices" would drown each other out. *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 376. Moreover, quite independent of the objective of bringing communicative order to the otherwise chaotic airwaves, the First Amendment tolerates a modest degree of government oversight of broadcast radio and television because such regulation assures that broadcasters, privileged occupants of a physically scarce resource, act in a manner consistent with their status as fiduciaries of the public's interest in responsible use of the spectrum. *Id.* at 389.

As this and other courts have recognized, the "scarcity rationale" has no place in evaluating government regulation of cable television.[32]

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[32] This court has also observed that technological advances may have rendered the "scarcity rationale" obsolete even for broadcasters. *Loveday v. FCC*, 707 F.2d 1443, 1458-1459 (D.C. Cir. 1983). Numerous scholars have taken the same position. *See, e.g.*, Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-226 (1982). The Supreme Court recently suggested, however, that it was not prepared to reconsider its "long-standing approach" to the broadcast medium. *FCC v. League of Women Voters of California*, 104 S.Ct. 3106, 3116 n.11 (1984). Although the Court in *League of Women Voters* applied to a broadcast regulation a standard of review similar to that sometimes applied to rules affecting other media, it made clear that the particular law at issue would receive far more exacting scrutiny if it were directed at non-broadcast speech.

> The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since an essential precondition of that theory —physical interference and scarcity requiring an umpiring role for government—is absent. * * *

Home Box Office, Inc. v. FCC, supra, 567 F.2d at 45. *See also Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1404; *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982); Note, *Cable Television and the First Amendment,* 71 COLUM. L. REV. 1008 (1971).

Nor do we discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media. We cannot agree, for example, that the mere fact that cable operators require use of a public right of way—typically utility poles —somehow justifies lesser First Amendment scrutiny. *See Omega Satellite Products Co. v. City of Indianapolis, supra,* 694 F.2d at 127. The potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system. No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid.[33]

Nor, on this record, can we concur in the suggestion that the "natural monopoly characteristics" of cable create economic constraints on competition comparable to the physical constraints imposed by the limited size of the

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[33] *See* CABLESPEECH, *supra* note 17, at 107.

electromagnetic spectrum. *Omega Satellite Products Co. v. City of Indianapolis, supra,* 694 F.2d at 127; *see also Berkshire Cablevision of Rhode Island, Inc. v. Burke,* 571 F.Supp. 976, 985-988 (D. R.I. 1983). At the outset, the "economic scarcity" argument rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges. *See* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 9-11 (1983). Moreover, the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any "natural" economic phenomenon. *See* R. POSNER, CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY 4 (Ford Foundation Memorandum RM-6309-FF 1970). In any case, whatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247-256 (1974). While *Miami Herald* involved the conventional press, as this court has had prior occasion to observe, there is no meaningful "distinction between cable television and newspapers on this point." *Home Box Office, Inc. v. FCC, supra,* 567 F.2d at 46.

Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling. Two influential commissions have in fact reached precisely that conclusion. In the words of the Cabinet Committee on Cable Communications, "[C]able development has the potential of creating an electronic medium of communications more diverse, more pluralistic and more open, more like the print and film media than like our present broadcast system." CABINET COMMITTEE

ON CABLE COMMUNICATIONS, CABLE: REPORT TO THE PRESIDENT, Ch. I, p. 14 (1974). *See also* SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 92 (1971) ("Cable television, by freeing television from the limitations of radiated electro-magnetic waves, creates * * * a situation more nearly analogous to that of the [print] press.").[34]

In sum, beyond the obvious parallel that both cable and broadcast television impinge on the senses via a video receiver, the two media differ in constitutionally significant ways. In light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable. Accordingly, we must look elsewhere to determine the appropriate yardstick against which to measure the constitutionality of the must-carry rules.

B. *The Appropriateness of Treating The Must-Carry Rules as an Incidental Burden on Speech*

That cable television shares attributes of the more traditional press does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation. As the *Home Box Office* court observed, for cable, no less than for other media, the First Amendment draws a distinction between "incidental" burdens on speech—regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas—and restrictions that are "intended to curtail expression—either directly by banning speech because of * * * its communicative or persuasive effect on its intended audience * * * or indirectly by favoring certain classes of speakers over others * * *." 567 F.2d at 47-48.

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[34] *See also* B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 200 (1975); *Electronic Newspaper, supra* note 7, 51 N.Y.U. L. REV. at 146.

If the regulation falls in the former category, it will be sustained if "it furthers an important or substantial governmental interest * * * and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien, supra,* 391 U.S. at 377. *See also Members of City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2129 (1984); *Procunier v. Martinez,* 416 U.S. 396, 411 (1974); *National Black United Fund, Inc. v. Devine,* 667 F.2d 173, 179 (D.C. Cir. 1981). If, however, the regulation cannot fairly be understood as a merely incidental restriction on expression, the regulation will be upheld, if at all, only if the government adequately carries a significantly heavier burden of justification.[35] Indeed, some governmental objectives—"such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—* * * are so plainly illegitimate" that they are forbidden altogether. *Members of City Council of*

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[35] Although in some contexts the government carries an extraordinarily "heavy burden of showing justification," *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (*per curiam*), the decisions at least contemplate (although they rarely in fact find) the existence of an interest that is so compelling that the regulation will be reluctantly upheld. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535, 540 (1980); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978). *See also* B. SCHMIDT, *supra* note 34, at 232-233. Some justifications, however, are patently illegitimate and simply will not be weighed in the balance. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2128 (1984). Where the object of the regulation is related to suppression or protection of a particular viewpoint, it is invalid unless it falls within one of a small number of strictly circumscribed categories. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975).

Los Angeles v. Taxpayers for Vincent, *supra*, 104 S.Ct. at 2128.

Thus the threshold question before us, as before the court in *Home Box Office*, is whether the intrusion worked by the challenged regulations merits treatment as an "incidental" burden on speech. In *Home Box Office* the court found that the FCC cable rules there at issue were best understood as embodying an interest unrelated to speech and therefore qualified for the analytic track set out in *O'Brien* and its progeny. That conclusion, as we now show, is far less certain in the context of the present challenge.

In one sense, of course, as is invariably the case,[36] the government can frame the interest served by the must-carry rules in essentially speech-neutral terms. So framed, the rules' object is to assure that the rise of a potentially monolithic national television industry not undermine the economic vitality of free, locally-controlled broadcasting.

Yet even so understood, the Commission's objective is a far cry from the sort of interests that typically have been viewed as imposing a merely "incidental" burden on speech. Although not intended to suppress or protect any particular viewpoint, the rules are explicitly designed to "favor[] certain classes of speakers over others." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48. Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. *Opinion and Order*, *Turner* J.A. at 3. Under the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels. In the case of systems saturated

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[36] *See* Ely, *supra* note 35, 88 HARV. L. REV. at 1496-1497.

with mandatory signals, cable programmers are shut out entirely from the only forum capable of conveying their programming. Because "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the conclusion that the must-carry rules burden First Amendment rights only incidentally is far from inevitable.[37]

Viewed from the perspective of the cable operator, the entity that delivers a preselected package of channels to paying subscribers, the must-carry rules are equally intrusive. The rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. The difficulty is not so much that the rules force operators to act as a mouthpiece for ideological perspectives they do not share, *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), although such a result is by no means implausible.[38] The more certain injury stems from the substantial limitations the rules work on the operator's otherwise broad discretion to select the programming it offers its subscribers. *See Miami Herald Co. v. Tornillo*, *supra*, 418 U.S. 241 (recognizing First Amendment protection of editorial discretion).

Although in cable's infancy cable operators served exclusively as passive conduits of broadcast signals, their

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[37] In the context of the print media, for example, it seems highly unlikely that a law requiring vendors of newspapers to carry local publications would be treated as an incidental burden on speech even though in some sense the purpose of the rule was viewpoint-neutral.

[38] One operator recently objected to the carriage of the religious programming of a local broadcaster. *See In re Group W Cable, Inc.*, *supra* note 13, 57 Rad. Reg. (P&F) at 638. The Commission denied the requested waiver.

editorial role has expanded dramatically over the course of the industry's brief history. *See generally* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 20-22 (1983). No longer mere "funnel[s] for other broadcasting," Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 367 (1965), operators now select from "a rich variety" of additional options, including locally originated cablecasts, and the programming of over 40 independent cable networks, which offer such diverse fare as movies, sports, news, live coverage of public events, and specialized presentations aimed at individual segments of the national audience. *In re Community Cable TV, Inc.*, 54 Rad. Reg. 2d (P&F) 1351, 1359 (1983). *See generally* H.R. Rep. No. 98-934, *supra*, at 21.[39]

Indeed, in the context of reviewing the FCC's power to promulgate regulations mandating public access to cable channels, the Supreme Court explicitly acknowledged the breadth of the editorial judgment exercised by cable operators. *Midwest II*, 440 U.S. at 707-708 n.17. No less than the access regulations at issue in *Midwest II*, the must-carry rules "significantly compromise" the cable operator's editorial discretion: "Even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept * * * programming will interfere with their determinations regarding the total service offering to be extended to subscribers." *Id.* Moreover, unlike access rules, which serve countervailing First Amendment values by pro-

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[39] As late as the mid-1970's it was not uncommon to suggest that the cable operator exercised no editorial discretion. *See, e.g.*, B. SCHMIDT, *supra* note 34, at 213. In today's video marketplace, especially in light of the advent of the cable programming industry, that suggestion is clearly anachronistic.

We need not decide whether the cable operator's editorial discretion is of the same order as that of a broadcaster or a newspaper. *See Midwest II*, 440 U.S. at 707-708 n.17. We have no doubt, however, that it is of sufficient magnitude to implicate the First Amendment.

viding a forum for public or governmental authorities, the must-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether.

That the intrusion into cable operators' editorial autonomy is deep does not, of course, require the conclusion that the rules are inappropriate for analysis under the *O'Brien* test. *Cf. Procunier v. Martinez*, *supra*, 416 U.S. 396. Nonetheless, the Supreme Court's prior treatment of other laws and regulations that impinged on the editorial function engenders at least some doubt about the appropriateness of shunting the must-carry rules onto the analytical track reserved for other incidental burdens on expression. Even for broadcasters, regulations that transfer control over programming content to others have met with approval only grudgingly and then only in highly specialized circumstances and without reference to the *O'Brien* balancing formulation. *See CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). More significantly, as the Court made clear in *Miami Herald Publishing Co. v. Tornillo*, *supra*, once outside the special constitutional realm reserved for privileged occupants of the physically scarce airwaves, the First Amendment guards against governmental intrusions into the editorial function even more jealously. *Compare Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. 367.

Indeed, if *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing the rules against the other *O'Brien* factors or applying any other form of interest-balancing.[40] In *Miami Herald* the Court faced a constitutional challenge to a Florida statute that re-

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[40] *But see* B. SCHMIDT, *supra* note 34, at 233-235 (describing absence of balancing in *Miami Herald* as aberrational and suggesting that such an approach would not invariably be followed).

quired newspapers to grant a right to reply to political candidates attacked in earlier editions. Without so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute. Forcing an editor to print that which he otherwise would not, the Court held, was a restraint the First Amendment simply would not tolerate. The result would be no different, the Court took pains to note, even if it could be shown that complying with the statute would cause the newspaper to suffer no additional costs. 418 U.S. at 258.[41]

In short, our examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech. Although the goal of the rules—preserving local broadcasting—can be viewed as unrelated to the suppression or protection of any particular set of ideas, the rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly, if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers. Indeed, as a matter of established regulatory policy, the Commission considers the desires of cable subscribers to be irrelevant to the application of the rules. *See, e.g., In Re Group W Cable, Inc.*, 57 Rad. Reg. 2d (P&F) 637, 639 (1984). This conscious disregard of subscribers' viewing preferences is difficult, if not impossible, to reconcile

[41] Applying this reasoning to Quincy suggests that it makes little difference to the analysis whether the cable system has two channels or 200.

with the Supreme Court's repeated admonition that the interests of viewers should be considered "paramount" in the First Amendment calculus. *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390. While, of course, viewers of broadcast television also have significant First Amendment interests, we doubt very much that cable subscribers "can[] be left out of the equation" entirely. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982).

We need not, however, definitively decide whether a more exacting standard than that announced in *O'Brien* and applied in *Home Box Office* is the correct test for evaluating the constitutionality of the must-carry rules. For even if we assume that the regulations burden speech only incidentally and therefore can pass muster under the First Amendment if they "further[] an important or substantial governmental interest" and impose a restriction "no greater than is essential to the furtherance of that interest," *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48, we have concluded that the must-carry regulations, as written, are clearly impermissible.

III. The Standard Applied

A. *The Substantiality of the Governmental Interest*

The Commission contends that the must-carry rules serve the interest of preserving free, locally-oriented television.[42] The difficult question whether, taken as an

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[42] The Commission and several intervenors obliquely suggest that, in addition to preserving localism, the rules are an integral part of the federal copyright scheme and, as such, serve another important interest. *See* 17 U.S.C. § 101 *et seq.* (1982). Under the Copyright Revision Act of 1976, cable operators are granted a compulsory license to retransmit broadcast signals in return for payment of a copyright royalty fee. *Id.* § 111(c)-(d). The obligation to pay royalties arises only from carriage of distant (non-network) signals, defined as

abstract proposition, that interest is sufficiently weighty to warrant the rules' interference with First Amendment rights must await resolution in another case. For even if we accept the common wisdom that the goal of encouraging "localism" qualifies as "important or substantial," *United States v. O'Brien, supra*, 391 U.S. at 377,[43] we would be unable to find that the FCC has carried its heavy burden of justification.

In many circumstances the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms. Two such circumstances are relevant to

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those extending "beyond the local service area of the primary transmitter." *Id.* The legislative history makes clear that the "local service area" corresponds to the area in which the station is entitled to mandatory carriage. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 99 (1976).

Neither the Commission nor the intervenors direct our attention to any suggestion in the Act or elsewhere that the must-carry rules serve as anything more than a convenient reference point for determining where a local signal ends and a distant signal begins. By invalidating the must-carry rules on First Amendment grounds, we do not, of course, suggest that they may not continue to serve that function.

[43] As recently as last year, this court recognized "the importance of local broadcasting to a national broadcasting system." *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). *See also Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2708 (1984). That view is clearly shared by Congress. Although the Commission's pursuit of "localism" is not embodied in an explicit statutory command, *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 FCC2d 676, 686 (1982) (*DBS Inquiry*), Congress has expressed its commitment to "a widely dispersed radio and television service" and has noted that the elimination of local service is a "matter of real and immediate public concern." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 & n.38 (1968), *quoting* S. Rep. No. 923, 86th Cong., 1st Sess. at 7 (1959).

this petition. First, if, as petitioners allege, the Commission has generally concluded that cable poses no threat to broadcasting, this change in perspective clearly would undermine its suggestion that "localism" is sufficiently important or substantial to warrant the significant abridgment of protected activity effected by the must-carry rules. Second, as this court stressed in *Home Box Office*, in the administrative context *O'Brien's* substantial interest requirement "translates * * * into a record that convincingly shows a problem to exist." 567 F.2d at 50.[44] At least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured. In the context of this case the question becomes whether the Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable.

We address each issue in turn.

1.

In a burst of deregulatory activity unparalleled in its history, the FCC has recently dismantled large portions of the extensive regulatory structure under which both broadcast and cable television have labored for many

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[44] Even in the context of reviewing legislative acts, the Supreme Court has frequently required more than an unsubstantiated assertion of the importance of the governmental interest. *See Members of City Council of Los Angeles v. Taxpayers for Vincent, supra* note 35, 104 S.Ct. at 2128 n.22 (Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-73 (1981) (rejecting government's claim in part because no evidence offered to support argument that zoning ordinance serves asserted interest).

decades. *See, e.g., Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 49 Fed. Reg. 33588 (1984) (to be codified at 47 C.F.R. § 73) (*Revision of Programming*). Details aside, the thrust of this movement has been the Commission's belief that the public interest in diverse video options is best served by deferring to the marketplace. *Id.; Economic Inquiry Report*, 71 FCC2d at 697. As part of this comprehensive endeavor, the Commission has eliminated numerous regulations which, like the must-carry rules, were premised on the desire to protect local broadcasters from competition from the expanding cable industry. *See, e.g., Syndicated Exclusivity Rules*, 79 FCC2d 663 (deleting distant-signal and syndicated-exclusivity rules). In addition, it has authorized a wide array of new multichannel video competitors to over-the-air broadcast television and exempted them from any obligation to carry local programming. *See, e.g., Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 FCC2d 676, 691-692 (1982) (*DBS Inquiry*).

Petitioner TBS contends that in the course of this deregulation the Commission has disclaimed the very premises on which the must-carry rules are founded.[45] If, in

[45] TBS also contends that the FCC's deregulatory efforts imply a complete abandonment of its concern for localism. That contention, we have concluded, is incorrect. It simply does not follow that deregulation, even massive deregulation, implies a wholesale abandonment of the goal of preserving local broadcast television. Although the Commission of late has pursued different means to that end—preferring to rely on the free market rather than active administrative oversight—it has never wavered from its view that preservation of local television is a cornerstone of its regulatory policy. In deleting the distant-signal rules, for example, the Commission observed that it was doing so only on the basis of its conclusion that elimination of the rules "creat[ed] no risks of serious harm to the welfare of off-the-air television view-

fact, the FCC has repudiated the economic assumptions that underlie the must-carry rules, the suggestion that they serve an important governmental interest (or any interest at all) would be wholly unconvincing. As the *Home Box Office* court stated, "[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" 567 F.2d at 36 (*quoting City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971)). Similarly, an asserted interest in alleviating or forestalling a problem—such as the destruction of free, local television—can hardly be considered "important or substantial" if the government now denies that the alleged problem is a problem at all.

TBS places particular reliance on the conclusions of the *Economic Inquiry Report*, the Commission's comprehensive analysis that culminated in deletion of several of the must-carry rules' regulatory siblings. "Upon examination of the economic evidence," the Commission stated, "we conclude that competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies. * * * [C]able does not appear to be a major negative force on the financial situation of television broadcasters * * *." 71 FCC2d at 661, 688. These conclusions, if given the broad applicability their sweeping tone suggests, would fatally undercut the Commission's argument that the must-carry rules serve the important end of preventing the destruction of free, local broadcasting.

The Commission parries this potentially mortal thrust by contending that the *Economic Inquiry Report* focused

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ers." *Syndicated Exclusivity Rules*, 79 FCC2d at 825 (Appendix). *See also Notice of Inquiry*, 65 FCC2d at 10. Thus, standing alone, the fact of substantial deregulation of cable television does not undermine the Commission's assertion that it remains ever vigilant to guard against the possibility that cable will threaten the economic viabilty of free, local broadcasting.

only on the effect of deleting the distant-signal and syndicated-exclusivity rules and "expressly assumed the continuation of the must carry rule[s]." Brief for respondents in No. 83-2050 at 11. That characterization is, at the very least, debatable. With the conclusions of the *Economic Inquiry Report* already in mind, the Commission, citing "administrative[] efficien[cy]," did explicitly exclude the must-carry rules from the proceedings that looked toward actual deletion of the distant-signal and syndicated-exclusivity rules. *Notice of Proposed Rulemaking*, 71 FCC2d 1004, 1006 (1979). TBS, however, focuses not on these rulemaking proceedings but on the antecedent *Economic Inquiry Report*.[46] That report, which was described by the Commission as "a general review of the economics of the relationship between television broadcasting and cable television," contains no such express reservation. *Notice of Proposed Rulemaking*, 71 FCC2d at 1005. Indeed, in embarking on its comprehensive economic analysis the Commission expressly excluded "debate over the merits of the existing regulatory" framework from its more "generalized inquiry." *Notice of Inquiry*, 65 FCC2d at 9-10.

More fundamentally, there is an obvious difference between reserving a matter for later consideration and holding its existence constant in the course of analyzing

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[46] The *Notice of Proposed Rulemaking* and the *Economic Inquiry Report* were adopted on the same day. The *Notice*, however, incorporated by reference the general findings of the *Economic Inquiry Report* and made clear that those findings were the predicate for its decision to institute rulemaking to delete the distant-signal-carriage and syndicated-exclusivity rules. The FCC directs our attention to references to mandatory carriage in the *Economic Inquiry Report*, *see* brief for respondents in No. 83-2050 at 11, *citing* 71 FCC2d at 658. But those passages merely describe the status quo; they contain no suggestion that the economic analysis depended on maintaining those regulations.

the interplay of other variables.[47] Although some of the studies relied on by the Commission may have tacitly assumed must-carry obligations in the markets under examination, its broad conclusion that cable television poses no "significant threat" appeared to rest largely on factors wholly unrelated to mandatory carriage. *Economic Inquiry Report*, 71 FCC2d at 661. Specifically, at least with respect to VHF licensees, the Commission looked to demographic trends, forecasts of the national economy, and the already abnormally high rate of return on investment earned by broadcasters to conclude that such broadcasters not only were not suffering unduly from competition from cable but could anticipate a "steady growth in * * * station revenues" in the future. *Id.* Far from "assum[ing] the continuation of the must carry rule[s]," the analysis of VHF stations appears to deny their major premise—that unfettered growth of cable television threatens the economic vitality of local broadcasting.

2.

But even if we accept that the Commission's position that it continues to stand by the economic assumptions on which the must-carry rules are premised, we would still be unable to conclude that it has adequately carried its heavy burden of justification. For if the FCC has not repudiated the rules' underlying assumptions, neither has it proved them. Twenty years ago the Commission acknowledged that it simply did not know what effect the advent of cable television would have on local television. *First Report and Order*, 38 FCC at 710 ("we think it impossible, with the data at hand, to isolate reliably the effects of CATV"). Relying on what it later described as "a more or less intuitive model" and its "collective instinct," *Notice of Inquiry*, 65 FCC2d at 9, 14, it con-

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[47] It is perfectly possible that an analysis focusing on one rule could reach conclusions that undercut the premises underlying another.

cluded that the threat to local television was sufficiently plausible to warrant promulgation of the must-carry rules. In light of the concededly speculative nature of its analysis, however, the Commission expressly recognized its "responsibility to get the facts * * * and to act upon them by revising or eliminating the restrictions on CATV as new information or experience more clearly illuminated the locus of the public's interest in the matter." *Economic Inquiry Report*, 71 FCC2d at 649-650 (footnotes omitted).

For many of its cable regulations, the Commission, with admirable vigor and creativity, has met its acknowledged responsibility to move beyond unsubstantiated intuition. For the must-carry rules, however, the Commission's promise "to get the facts" remains unfulfilled. *Id.* In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting. Indeed, as noted above, to the extent the Commission has addressed these issues at all, it has questioned their validity.[48]

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[48] In addition to casting doubt on the fragility of the economic health of many broadcasters, the Commission also appears to have denied that a switching device, such as an A/B switch, poses a significant barrier to receiving off-air signals. *In the Matter of Rules and Regulations to Require Carriage of Subscription Television Signals*, 77 FCC2d 523, 529 (1980). If, then, the act of flicking a switch is not a significant deterrent to viewing off-air signals, cable sub-

In short, here, no less than in *Home Box Office*, the FCC has failed to "put itself in a position to know" whether the problem the rule seeks to cure—the destruction of free, local television—"is a real or merely a fanciful threat." 567 F.2d at 50. That approach, we have concluded, falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules. *See First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 786; *Preferred Communications, Inc. v. City of Los Angeles*, *supra*, 754 F.2d at 1406 n.9. Although in some instances "complete factual support * * * for the Commission's judgment or prediction is not possible or required," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), as we now explain, the particular circumstances of this constitutional challenge make continued deference to the Commission's concededly unsupported determinations plainly inappropriate.

We note first that, in sharp and unexplained contrast to its defense of the must-carry rules, the Commission itself now applies a far more rigorous standard of proof before crediting the broadcast industry's inevitable refrain that regulation is essential to protect it from the deleterious effects of new video technologies. As a matter of explicit agency policy, the Commission will consider such regulation only if presented with "hard evidence" that the new technology "will have a critically adverse effect on existing broadcast service." *DBS Inquiry*, 90 FCC2d at 689. "[S]peculative allegations concerning possible reductions in service from other sources" simply will not do. *Id.* at 691. Indeed, one Commissioner sur-

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scribers, if given such a switch, could still receive local broadcasts provided only that their antennas remained attached. Thus the economic rationale underlying the must-carry rules—preventing audience fragmentation with its concomitant impact on station revenues—turns on whether cable subscribers will actually disconnect their antennas. That purported phenomenon is almost certainly susceptible of empirical proof.

veyed the FCC's post-1979 regulatory and concluded that the Commission had effected a complete reversal of the burden of proof applied in assessing the need for cable regulations.

> In effect, [the Commission's initial policy toward cable] assumed harm to the public interest before it materialized and placed a heavy burden of proof on new technology and additional services to show that they would not injure the status quo. * * * As the [*Economic Inquiry Report*] makes plain, something more than mere conjecture or intuitive assumptions should be required before we impose regulatory constraints and burdens on one industry or technology in favor of another. * * * With these actions, the burden of proof is now where it properly belongs: on those seeking protection against competition, diversity, and innovation.

Economic Inquiry Report, 71 FCC2d at 949 (concurring statement of Commissioner Fogarty). In light of the Commission's express unwillingness to premise intrusive regulations on unsubstantiated speculation, we find it difficult to sustain the suggestion that we defer to the Commission's admittedly unproven belief that the must-carry rules in fact serve the substantial interest of protecting local broadcasting.

Moreover, this is demonstrably not an instance in which "complete factual support * * * for the Commission's judgment or prediction is not possible * * *." *FCC v. National Citizens Committe for Broadcasting*, *supra*, 436 U.S. at 814. When the FCC first asserted jurisdiction 20 years ago, the cable industry was in its infancy and its impact on local broadcasting could not be gauged with accuracy. In that historical context, courts faced with nonconstitutional claims concerning the breadth of the FCC's jurisdiction consistently and appropriately deferred to the Commission's admittedly speculative fears that the advent of cable television would displace local broadcasting. *See, e.g., United States v. Southwestern*

Cable Co., supra, 392 U.S. at 175. Nearly two decades have now passed, and the Commission has shown itself capable of the most sophisticated analysis of the effects of cable on conventional television. *See Economic Inquiry Report*, 71 FCC2d at 673. And yet, even in the context of a serious constitutional challenge, a context in which it must affirmatively bear the burden of proof, *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion), it continues to rely on precisely the kind of "speculative allegations" it expressly refuses to credit elsewhere. *DBS Inquiry*, 90 FCC2d at 691. At some point, especially where First Amendment rights are at stake, the Commission must do more than ask us to defer to its "more or less intuitive model" and "collective instinct" to sustain its assertion that a rule is both necessary and important. *Economic Inquiry Report*, 71 FCC 2d at 634. Where, as here, the Commission itself has expressly acknowledged that its regulatory premises are susceptible of empirical proof[49] and, in fact, has demanded such proof as a prerequisite of regulation in analogous contexts, we believe that point has passed.

We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment. As long as it continues to

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[49] "Truths hitherto established by collective instinct may be verified * * * [or] disproved." *Notice of Inquiry*, 65 FCC2d at 14.

rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done.

B. *The Congruence Between Means and Ends*

Even were we to conclude that the Commission adequately demonstrated the substantiality of the interest served by the must-carry rules, we could uphold their validity only if the restriction on activity protected by the First Amendment were "no greater than is essential to the furtherance of that interest." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48, *quoting United States v. O'Brien*, *supra*, 391 U.S. at 377. The task of evaluating the constitutional sufficiency of the congruence between the government's means and its ends is often a delicate one. On the one hand, we must, at the very least, make sure that the challenged regulation not gratuitously impinge on protected activity that poses no threat to the interest the agency is seeking to further. *United States v. Albertini*, 53 USLW 4844, 4848 (U.S. June 24, 1985). On the other hand, we must be careful not to lose sight of our proper role in the constitutional scheme. As this court recently had occasion to observe, our duty to police the First Amendment's requirement that intrusive governmental action be narrowly tailored to the evil sought to be corrected does not imply the authority to "fine-tune" administrative regulations. *White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518, 1529 (D.C. Cir. 1984); *see also Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3072 (1984). An agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives. Once we have determined that the agency action

falls within the wide range of constitutionally permissible regulatory options, our task is at an end.[50]

Fully aware of the breadth of the agency's discretion and the concomitant limits on the scope of our review, our analysis leaves us with no doubt that the must-carry rules, as currently drafted, represent a "fatally overbroad response" to the perceived fear that cable will displace free, local television. *FEC v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1470 (1985). We stress that "[w]e are not quibbling over fine-tuning * * *." *Id.* at 1471. For, as we now show, it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives.

1.

In the Commission's own words, the must-carry rules are designed to "maintain the availability of local broadcast service to both those who [are] cable subscribers and those who [are] not." *Opinion and Order*, *Turner* JA at 2. The goal is to assure that "as many communities as possible * * * have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Economic Inquiry Report*, 71 FCC2d at 644, *quoting Sixth Report and Order*, 41 FCC 148, 172 (1952). Thus, and the distinction is critical, the rules seek to protect local broadcast*ing* and not local broadcast*ers*. As the Commission itself acknowledges, it "cannot reject a new [video] service solely because its entry will reduce the revenues or profits of existing licensees. * * * 'Plainly, it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public.'" *DBS Inquiry*, 90

[50] The trick, of course, is to determine the contours of this "zone of constitutionality." *See White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518, 1542 (D.C. Cir. 1984) (Wald, J., concurring in the judgment in part and dissenting in part).

FCC2d at 689, *quoting FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). *See also National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) ("existing licensees[] have no entitlement that permits them to deflect competitive pressure from innovative and effective technology"). Indeed, were the individual broadcasters themselves the object of the Commission's favors, the objective itself would be fundamentally illegitimate. In this regard, the Supreme Court's admonition in *Buckley v. Valeo*, *supra*, 424 U.S. at 48-49, bears repeating: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment * * *."

2.

But, if the goal is to preserve "localism" and not "local broadcasters," the must-carry rules are "grossly" overinclusive. *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 50. The rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system.[51] Indeed, it is entitled to carriage even if it carries no local programming at all.[52]

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[51] The Commission does not contest TBS's contention that in some instances cable operators are obligated to carry over 20 mandatory signals.

[52] This prospect is by no means entirely academic. Under the Commission's recently revised approach, broadcast licensees need no longer provide specified amounts of community-oriented programming, but instead can rely, at least in part, on the offerings of other local stations to satisfy their programming obligations. *Revision of Programming*, 49 Fed. Reg. at 33588, 33592-33594. Perhaps spurred by this change, sev-

We readily acknowledge that it is for the Commission as Congress' delegate and not this court to address the essentially legislative question of the optimal amount of

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eral broadcasters have announced plans to provide a full day of music videos, programming that, of course, is devoid of any local orientation at all. *Broadcasting*, June 25, 1984, at 50.

Commenting on the disparity between the rule's goal of preserving localism and the effect of its application to Quincy Cable, the dissenting Commissioner in *Quincy* observed:

> In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps as a matter of law, rest with Quincy Cable.
>
> Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest[ion] that any of the stations target any of their programming to Quincy.
>
> * * * *
>
> * * * Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

Quincy JA at 34-36 (Commissioner Jones, dissenting).

local service or programming in a given community. But in the context of the must-carry rules the FCC has simply never grappled with this issue. The rules themselves suggest an implicit determination that "more is better," but in those rare instances in which the Commission has intimated its views it has never taken so absolute a position. Indeed, in its most recent and comprehensive exposition of its regulatory objectives the Commission suggested that its goal was to preserve "a modicum of local programming," an objective significantly narrower than the undifferentiated sweep the must-carry rules would suggest. *Economic Inquiry Report*, 71 FCC2d at 661.[53] It is far from clear to us how a community that already has 17 local broadcast stations carried over the cable system is not already "enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Id.* at 644.

It may well be that in some circumstances requiring carriage of the 18th broadcast station is consistent with the objective of preserving free, community-oriented television. And we certainly do not mean to imply that there is such a thing as too many communicative outlets in a given community. It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences. Given the substantial First Amendment costs implicit in this sweeping guarantee, the Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules. Until it establishes a

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[53] *Compare First Report and Order*, 38 FCC at 699 (stating that objective in 1965 was to assure a "large number of local outlets"). What constituted a "large number" was left unexplained. Similarly unexplained is how or whether the approximate doubling of the number of broadcast stations across the country since 1965 bears on this determination.

baseline for its general objective of preserving free, community-oriented television—measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within its discretion to choose—we simply cannot know whether the rules are adequately tailored to pass constitutional muster. In this circumstance, the Commission has fallen far short of *its* "affirmative obligation" to show the requisite fit between means and ends. *Revision of Programming*, 49 Fed. Reg. at 33593 n.46.

3.

In addition to their complete indifference to the quantity of local television already available either over the air or on the cable system itself, the rules' overinclusiveness lies in their indiscriminate protection of every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being. Indeed, the Commission has expressly taken the position that the "financial health" of the broadcaster is irrelevant to its absolute right to occupy a channel on the local cable system. *First Report and Order*, 38 FCC at 713.[54] This blanket protection, by sweeping even the most financially secure broadcaster under the rules, beneficent mantle, reaches well beyond the rules' asserted objective of assuring that the advent of cable technology not undermine the financial viability of community-oriented, free television.

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[54] The Commission recently required a cable system to carry broadcast signals that could not be received over the air in the system's community. In this circumstance the rule is completely adrift from its economic rationale. The affected cable system could not possibly have been injuring the benefitted broadcaster by fragmenting its audience. *See Amendment of the Commission's Rules Regarding Major Television Markets*, 50 Fed. Reg. 2565, 2568-2569 (1985) (to be codified at 47 C.F.R. § 76.51) ; *see also* 57 Rad. Reg. (P&F) 1061 (dissenting statement of Commissioner Patrick).

Significantly, this complete absence of any effort to analyze the extent to which the must-carry rules further their stated objective is in sharp contrast to the Commission's analysis elsewhere. In the *Economic Inquiry Report*, for example, the Commission found that any cable-induced audience loss suffered by VHF licensees, who already "earn substantially more than a normal return on their tangible investment," takes place "in a context of offsetting factors [such as] [i]ncreases in population and in the level of economic activity," which "result in a fairly steady growth in the demand for advertising exposures and in station revenues." *Economic Inquiry Report*, 71 FCC2d at 661. If, in fact, "offsetting factors" render VHF broadcasters (or an identifiable subset of that group) relatively immune to the competitive impact of cable, then rules designed to guard against their demise or diminished profitability are clearly pointless. Yet, oblivious to the must-carry rules' primary object of protecting local broadcasters from competitive injury (and thus preserving localism), each and every broadcaster from the struggling UHF educational station to the most profitable VHF network affiliate—no matter how profitable, no matter how invulnerable to significant cable-induced revenue losses—can demand mandatory carriage.

We note again that it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection. We observe only that the Commission's failure to draw any lines at all makes it impossible to conclude that it has satisfied its affirmative obligation to prove that the rules are "sufficiently tailored to the harms it seeks to prevent to justify its substantial interference" with First Amendment rights. *FCC v. League of Women Voters of California, supra*, 104 S.Ct. at 3124. At some point the goal of preserving localism becomes undiffer-

entiated protectionism.[55] Until the Commission makes some effort to demonstrate the contrary, the blunderbuss approach of the rules in their current form makes inescapable the conclusion that that point has been passed.

IV. Conclusion

Regulation of emerging video technologies requires a delicate balancing of competing interests. On the one hand, a regulatory framework that throttles the growth of new media or otherwise limits the number and variety of outlets for expression is likely to run afoul of the First Amendment's central mission of assuring "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). On the other hand, unfettered growth of new video services may well threaten other deeply ingrained societal values. In particular, the complete displacement of expressive outlets attuned to the needs and concerns of the communities they serve not only would contravene a long-standing historical tradition of a locally oriented press but might itself disserve the objective of diversity.

When the Commission strikes this balance in favor of regulations that impinge on rights protected by the First Amendment, it assumes a heavy burden of justification. As the Supreme Court made clear long ago, "Mere * * * preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State*,

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[55] Especially troubling is that the rules apply with equal force regardless of the degree of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry 12. Nor do they distinguish between systems that are saturated with must-carry signals and those that are not. Moreover, occasional exceptions aside, the waiver procedure has been demonstrably insensitive to these concerns. *See* note 13 *supra*.

308 U.S. 147, 161 (1939). Even where the infringement on protected First Amendment rights is incidental to the pursuit of other legitimate objectives, the government must affirmatively demonstrate that the regulation is narrowly tailored to serve a substantial interest.

After extensive examination of the purposes and effects of the must-carry rules, we have concluded that the Commission has failed to carry this heavy burden. After the passage of nearly two decades, and despite its demonstrated capacity to do so, the Commission has failed entirely to determine whether the evil the rules seek to correct "is a real or merely a fanciful threat." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 50. Moreover, because the must-carry rules indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community, the rules are insufficiently tailored to justify their substantial interference with First Amendment rights.

We stress that we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment. We hold only that in their current form they can no longer stand. Accordingly, with respect to petitioner Quincy, we vacate the order requiring compliance with the must-carry rules and imposing a fine for its failure to do so. With respect to petitioner TBS, we vacate the order that reaffirmed the constitutional validity of the rules as a basis for denying the petition for rulemaking. Given our general conclusion that the rules are unconstitutional, we need not confront the delicate question of our power to compel rulemaking. Should the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so. We would consider the constitutionality of the product of that effort at the appropriate time.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 83-1283

QUINCY CABLE TV, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents*
KHQ, INCORPORATED, *et al., Intervenors*

No. 83-2050

TURNER BROADCASTING SYSTEM, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents*
METROMEDIA, INC., *et al., Intervenors*

Before WRIGHT, GINSBURG, and BORK, Circuit Judges.

ORDER

[Filed August 30, 1985]

It is ORDERED by the court, *sua sponte,* that the opinion filed July 19, 1985 in the above cases be, and it is hereby, amended as follows:

Page 6: Change "enes" at the beginning of line 12 of text to "ences"

Page 10: Change line 6 from the bottom of text to read:

Cable Co., supra, 392 U.S. at 174, *quoting* H.R. Rep.

Page 11: Insert a comma between "76.5" and "76.51," at the end of the first line of footnote 12

Change "76.5" at the end of the first paragraph of footnote 12 to "76.57"

Page 43: Change line 5 of text to read:

Part 73 of 47 C.F.R.) *(Revision of Programming)*. Details

Page 49: Insert the word "posture" after the word "regulatory" in line 1 of text

Page 56: Change the comma after the word "rules" in line 5 from the bottom of text to an apostrophe

Per Curiam

For the Court

/s/ GEORGE A. FISHER/SAB
George A. Fisher
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 83-1283.

QUINCY CABLE TV, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

KHQ, INCORPORATED, SPOKANE TELEVISION, INC., KING BROADCASTING COMPANY, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, NATIONAL ASSOCIATION OF BROADCASTERS, TOWN OF QUINCY, WASHINGTON, *Intervenors.*

Argued 17 Jan. 1984.

Decided 30 March 1984.

Petition for Review of Orders of the Federal Communications Commission.

John P. Cole, Jr., Washington, D.C., with whom David M. Silverman, Washington, D.C., was on the brief, for petitioner.

Gregory M. Christopher, Counsel, F.C.C., Washington, D.C., with whom Bruce E. Fein, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel, F.C.C. and J. Paul McGrath, Asst. Atty. Gen., Robert B. Nicholson and Margaret G. Halpern, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

Michael D. Berg, Washington, D.C., with whom Erwin Krasnow for National Association of Broadcasters, Washington, D.C., Arthur Stambler for Spokane Television, Inc., Edward W. Hummers, Jr. and David G. Rozzelle,

Washington, D.C., for King Broadcasting Co. were on the joint brief, for intervenors.

R. Russell Eagan, Washington, D.C., was on the brief for intervenor, KHQ, Inc.

J. Laurent Scharff, Jack N. Goodman and James M. Smith, Washington, D.C., were on the brief for intervenor, Association of Independent Television Stations, Inc.

Lewis J. Papers, Lawrence A. Horn, Nancy H. Hendry and Eric H. Smith, Washington, D.C., were on the joint brief for intervenors, Corporation for Public Broadcasting, et al.

Before WRIGHT, WILKEY and BORK, Circuit Judges.

Opinion PER CURIAM.

This case is a petition for review of orders of the Federal Communications Commission (the "FCC") requiring Quincy Cable T.V., Inc., to carry the signals of three commercial broadcast stations over Quincy Cable's cable television system. Quincy Cable contends that the FCC's orders violate the first amendment of the Constitution and are an unconstitutional taking of private property without just compensation. Quincy Cable further contests the lawfuless of a $5,000 forfeiture imposed on it by the FCC for Quincy Cable's failure to comply with an order of the Chief of the Cable Television Bureau of the FCC.

To our utter astonishment, the parties to this review presented significant factual developments to the Court on the eve of oral argument, which developments apparently were not considered by the FCC, despite their relevance to the legal contentions of the parties. Accordingly, we remand the record to the FCC for a determination of Quincy Cable's claims in light of the current facts pertaining to Quincy Cable's channel capacity, tier structure, and other

factual developments not considered in the record of the FCC's prior proceedings.

Quincy Cable operates a cable television station in Quincy, Washington, a town approximately 125 miles equidistant from Spokane and Seattle. At the time of Quincy Cable's initial petition to the FCC for an exemption from the FCC's "must carry" rule,[1] in November of 1979, Quincy Cable delivered 12 channels of video service to its subscribers. The programming of these 12 channels included three commercial network stations in Seattle, which were not viewable off-the-air in Quincy, and three commercial network stations in Spokane which were viewable off-the-air.[2] Quincy Cable sought to drop the three Spokane stations from its cable coverage, because it planned to replace those three commercial broadcasts with different programming not available to viewers in Quincy by means of the viewers' television antennas. It requested an exemption from the FCC's rule that requires a cable television system to carry, upon a broadcaster's request, the signals of each local, commercial broadcast television station.[3] Quincy Cable

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[1] The "must carry" rule provides:

> A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permitee, shall carry the signals of . . . .
>
> (4) Commercial television broadcast stations that are significantly viewed in the community of the community unit.

47 C.F.R. § 76.57 (1982).

[2] *See* Joint Appendix (J.A.) at 38-40.

[3] *See supra* note 1.

claimed that the requirement that three of Quincy Cable's 12 cable channels be used to carry the Spokane stations' signals was a hardship to Quincy Cable and its subscribers.[4]

The Chief of the Cable Television Bureau denied Quincy Cable's request to discontinue carriage of the three Spokane stations in April of 1980.[5] (*Quincy I*) In its petition for reconsideration, Quincy Cable contended that the Bureau Chief's order was a violation of the first and fifth amendments of the Constitution and it sought a stay of the order requiring it to carry the three stations' signals on three of its 12 channels. The Bureau Chief denied Quincy Cable's request for reconsideration and dismissed its motion for a stay "as moot."[6] (*Quincy II*) The Chief's order was again challenged by Quincy and was again denied by the Bureau Chief in September of 1981.[7] (*Quincy III*) Quincy Cable promptly sought review by the full Commission of these three orders of the Bureau Chief. The full Commission affirmed the Bureau Chief in all respects and ordered Quincy Cable to pay a forfeiture of $5,000 for its refusal to abide by the orders of the Chief.[8] (*Quincy IV*) Quincy Cable sought reconsideration of the FCC's order, which was denied by the Commission in its Memorandum Opinion and Order of 17 February 1983.[9] (*Quincy V*) This petition for review ensued.

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[4] J.A. at 39-42.

[5] J.A. at 1-2.

[6] Memorandum Opinion and Order, 18 August 1981, J.A. at 3-9.

[7] J.A. at 10-11.

[8] Memorandum Opinion and Order, 22 April 1982, 89 FCC 2d 1128 (1982), J.A. at 12-22. After *Quincy I*, Quincy Cable dropped two of the Spokane stations from its cable carriage and did not resume carrying them until the full Commission issued *Quincy IV*.

[9] Memorandum Opinion and Order, 17 February 1983, J.A. at 23-36.

Each of the orders and opinions of the Bureau Chief and the Commission was premised on the fact that Quincy Cable operated a cable system of 12 channels, three of which were used to carry the signals of the commercial broadcast stations in Spokane under the FCC's "must carry" rule. In the briefs submitted to this Court on review, petitioner contended that the FCC's actions violated the first amendment by, in effect, proscribing the system from delivering new programs in the viewers' interests "because of the cable television station's limited capacity which permits a maximum of 12 channels of service. . . ."[10] Furthermore, the petitioner challenged the FCC's orders in this Court as a taking of private property without just compensation, in violation of the fifth amendment, because "the cable system is compelled to dedicate three of its 12 channel delivery service (25% of total capacity) to carriage of the programs and advertising messages of commercial television stations. . . ."[11]

One week before oral argument in this case, the Court was informed that Quincy Cable had expanded its channel capacity from 12 to over 30 channels.[12] We were subsequently informed that Quincy Cable's system had been rebuilt to reach a delivery capacity of 24 channels in June 1982 and that Quincy Cable was further renovated to reach its apparently current capacity of 32 channels in January of 1983, a full year before oral argument in this case. Quincy Cable's 32 channels are arranged on different tiers, and involve the use of convertors and varying rental charges for subscribers. Seven of the channels apparently are not currently filled with any programming. Although the technological expansion of Quincy Cable from 12 channels to

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[10] Brief of Petitioner at 12.

[11] Brief of Petitioner at 14.

[12] Supplemental Brief for Respondents at 2.

over 30 appears to have been fully effected before the FCC's final order in this case, the FCC's final order, the record, and the briefs submitted to us on review were all based on the factual predicate that Quincy Cable had a limited 12-channel capacity. When the inaccuracy of this factual premise was fully brought to light at oral argument, counsel for the FCC requested that the Court remand the record to the Commission for its consideration of Quincy Cable's claims in light of the expanded channel capacity and related factual developments.

We are unwilling to decide Quincy Cable's challenges to the FCC's actions on the basis of a factual record which, it turns out, may be highly inaccurate in substantial and relevant part. We, therefore, remand the record to the FCC for it to consider Quincy Cable's claims in light of the current facts, so that the FCC's decision, as well as any subsequent review by this Court, will be grounded on a proper factual basis. In so doing, we note that over three years passed between the date of Quincy Cable's initial request for an exemption from the "must carry" rule and the FCC's final order in this case. Because of this long lapse of time, we remand to the FCC with instructions that the matter be handled expeditiously and that a final determination be issued by the FCC within six months.

• • •

For the reasons stated above, the record herein is remanded to the FCC for further proceedings in accordance with this opinion. The Commission is directed to complete those proceedings and to return the record within six months from the date on which this opinion is issued. This panel will retain jurisdiction of the matter. We will consider this case upon the return of the record as supplemented and we will entertain appropriate motions if the FCC fails to take final action within six months.

It is so ordered.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RM - 3786 MM
FCC 84-136

In the Matter of

Petition for Rulemaking to Delete the Cable Television Mandatory Signal Carriage Rules

MEMORANDUM OPINION AND ORDER

Adopted April 6, 1984; Released: April 6, 1984

By the Commission: Commissioner Quello issuing a separate statement.

1. Pending is a petition filed on October 5, 1980 by Turner Broadcasting Systems, Inc., ("Turner") requesting commencement of a rulemaking proceeding to consider elimination of the cable television mandatory local television broadcast signal carriage rules.[1] On October 4, 1983, Turner filed a petition with the United States Court of Appeals for the District of Columbia Circuit, contending that the Commission had, in effect, denied the petition by failing to act on it and requesting that the Court order the agency to commence the requested rulemaking proceeding or act on the petition.

2. In summary form, the petition argues that the rules should be repealed for the following reasons: (1) they violate the First Amendment by requiring carriage of particular programming on cable systems; (2) they are not supported by any evidence of need or important governmental interest since the signals in question can be re-

[1] 47 C.F.R. Sections 76.55, 76.57, 76.59, 76.61 and 76.63.

ceived by cable subscribers through use of an A/B switch and an off-air antenna; and (3) they are unfair and anti-competitive in that they guarantee local stations cost-free cable disribution in contrast to cable origination services such a CNN which must pay for carriage or are unable to find channel capacity which might be available in the absence of must carry obligations.

3. We are not prepared to act favorably on this petition at this time, and, in light of the pending court proceeding, are issuing this opinion to explain the reasoning underlying that decision. But for the pendency of the court proceeding, we would have withheld action until staff resources had become available for a more in-depth examination of some of the issues involved. We recognize, however, that parties petitioning the Commission in the rulemaking context are entitled to have a Commission response and that in the absence of such action much time and effort would be occupied by this agency and by the Court of Appeals in what would at best be procedural arguments. We are, accordingly, issuing this opinion as an explanation of our belief that the proceeding requested should not be commenced at this time.

4. At the outset, as we have indicated in numerous decisions under the rules, the courts have reviewed the rules from a constitutional perspective and found them not in violation of the First Amendment or the Fifth Amendment. *Black Hills Video Corp. v. FCC,* 399 F.2d 65 (8th Cir. 1968).[2]

5. From a policy perspective, there are countervailing arguments both for keeping and for dispensing with these rules. In terms of the rationale for keeping the rules, it

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[2] These issues are again being addressed to some extent in *Quincy Cable TV, Inc., v. F.C.C.*, D.C. Cir. No. 83-1283 (filed May 31, 1983) (Record remanded to Commission March 30, 1984) and some further insight on these issues may come from the Court's decision in that case.

must be recognized that they were adopted because the Commission believed they were necessary to maintain the availability of local broadcast service to both those who were cable subscribers and those who were not. *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 725 (1966); *Cable Television Report and Order*, 36 FCC 2d 143, (1972). Protection of these interests has been recognized as a legitimate Commission objective. *E.g. U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

6. While in some contexts, service to one group in the population bringing some deprivation to another group might be considered simply the marketplace imposing its discipline on the allocation of goods and service, there are countervailing arguments in this instance. Petitioner's argument fails to note the nature of the marketplace in which cable operators currently negotiate for broadcast programming. Although cable systems are dependent upon access to television broadcast signals, these signals are available to cable systems without the necessity of direct negotiations with station owners or program providers by virtue of the compulsory copyright licensing system.[3] This system was adopted in 1976 with the apparent belief that continuance of the mandatory signal carriage rules was to be part of a legislative/regulatory package. It is contended that the existence of an A/B switch would be a satisfactory substitute for the mandatory carriage rules in terms of protecting access of off-air stations to cable subscribers and thus their viability and accessability to nonsubscribers. Our extensive experience with television broadcast reception in connection with implementation of the All Channel Receivers legislation suggests otherwise; even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability.

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[3] Public Law 94-553, 17 U.S.C. §§ 101 *et seq.* (1976).

7. With respect to arguments urging repeal of the rules, particularly from the perspective of cable subscribers and nonbroadcast program originators, we find factors that suggest reasons for review of these rules. These rules, as we have stated in the past, are intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose. In this sense, they may work against the interest of one element of society—cable subscribers. Moreover, they force nonbroadcast program originators and distributors into a difficult competitive situation as compared with licensed broadcast stations. These programmers are not provided with a governmentally authorized local transmission facility, i.e., a broadcast frequency, for the distribution of their programming and their prime competitors (local stations) have free carriage on local cable television systems. This allocation of cable channels not only places competitors on an unequal footing but it also takes cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use.

8. Thus, in the final analysis, the decision to retain or eliminate these rules involves a complicated balancing of considerations. We are not persuaded to proceed with the requested rulemaking proceeding at this time, however, because of the virtually complete absence of evidence in that request (or indeed from our own research or other sources) relating to the impact deletion of these rules would have on the television broadcast service received by the public. The rulemaking petition process exists, *inter alia,* to afford interested persons an opportunity to bring information to our attention which suggests that the underlying factual basis which led to the adoption of particular rules no longer exists. Turner Broadcasting has made no effort to supply us with that information and it is critical to any determination of whether a rulemaking proposal should be issued. Given the radical shift in competitive

relationship between the broadcast and cable television industries that changes in these rules could bring about, we believe a more complete factual base is needed before a proceeding of the type requested is commenced.[4]

9. We are also not persuaded, on the basis of the information contained in the petition, that this is a situation like that in *Geller v. F.C.C.*, 610 F. 2d 973 (D.C. Cir. 1979), in which evidence of changed circumstances mandated a formal review of the rules in question. In fact, two of the most significant changes that have occurred—growth in cable subscribership and growth in system channel capacity—have made carriage less burdensome and the impact of noncarriage more significant for local broadcast station operations. These changes would appear to support continuation of the rules rather than elimination. The growth of nonbroadcast cable services is clearly a factor that was anticipated when the rule were reaffirmed in the 1972 *Cable Television Report and Order*, 36 FCC 2d 143 (1972). The existence of A/B switches was recognized at an even earlier date, being at one point specifically mentioned in the mandatory signal carriage rules. In sum, we find no compelling changed circumstance of a type that would require commencement of the requested proceeding.

Accordingly, IT IS ORDERED, that RM-3786 filed by Turner Broadcasting System, Inc. IS DENIED.

FEDERAL COMMUNICATINS COMMISSION

William J. Tricarico
Secretary

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[4] Nothing herein should be taken to prejudge in anyway the issue of whether multichannel television sound should be included within the cable carriage requirement or to preclude the Commission revisiting this entire issue at a later date. The issue of multichannel sound carriage has been an issue in BC Docket 21323 (48 Fed. Reg. 37475) and a further proceeding on that issue is under consideration.

Separate Statement of
FCC Commissioner James H. Quello

In Re: Petition for Rulemaking to Delete the cable Television Mandatory Signal Carriage Rules (RM-3786).

I am writing to emphasize my continuing concern for the importance of the mandatory carriage rules as a means of ensuring that the public will not be denied access to local broadcast services. While new technologies are permitting broadcasters to offer a wide variety of services besides local broadcast programming, it is local program service that is the bedrock of Congress' regulatory scheme for telecommunications. In my view, it is one of this Commission's primary responsibilities to ensure the continued viability of local telecommunications services to the public, and I continue to believe that the mandatory carriage rules perform this essential function.

APPENDIX D

QUINCY I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

April 28, 1980

In reply refer to: 4100-PP

Clifton W. Collins, President
Quincy Cable TV, Inc.
P. O. Box 127
7 'D' Street, S.W.
Quincy, Washington 98848

In re: Quincy Cable TV, Inc.
Quincy, Washington
CSR-1678; WA0295

Dear Mr. Collins:

On November 19, 1979, you submitted a letter to the Commission, requesting an opinion on your intention to discontinue carriage of Stations KXLY-TV (ABC, Channel 4), KHQ-TV (NBC, Channel 6) and KREM-TV (CBS, Channel 2), all Spokane, Washington, from your system serving Quincy, Washington. This letter was accepted as a petition for special relief on December 17, 1979, after the submission of an affidavit of service. On January 28, 1980, an opposition was filed to this petition on behalf of King Broadcasting Company, licensee of Station KREM-TV. Subsequently, on February 14, 1980, a second opposition was filed on behalf of KHQ, Inc., licensee of Station KHQ-TV.

As justification for your waiver request you state that Quincy, which receives both Seattle and Spokane signals, lies equidistant between the two communities. However, the residents of Quincy have a greater community of interest in the Seattle stations, particularly as they carry sports programming unavailable from Spokane. You argue that

the Spokane signals, which are received via translators, have a poor technical quality and a poll of the local residents indicates little support for their retention. Although, the Spokane stations are classified as significantly viewed in Grant County, Quincy Cable requests a waiver to delete these signals in favor of new programming of more interest to the community—Station WOR-TV (Ind., Channel 9), New York, New York, or ESPN, Nickelodeon, and Cable News Network. Finally, you contend that until such time as Quincy Cable can expand, KXLY-TV, KHQ-TV, and KREM-TV are easily available over the air and without their deletion any new programming would necessitate the use of converters, which would be an unfair economic hardship to the subscribers.

In their oppositions, both KREM-TV and KHQ-TV argue that Quincy Cable has failed to provide adequate justification for its waiver request. The stations maintain that viewer preference as to which signals should be carried is not sufficient grounds for waiver, and the Spokane signals' significantly viewed status and availability over the air speak for their importance to the community.

After careful consideration of the arguments, we are not persuaded that a waiver should be granted. Quincy Cable provides no evidence to support its claim of the technical inferiority of the Spokane signals. See *Missouri Valley TV Co., Inc.* (Chamberlain, South Dakota), FCC 76-948, 61 FCC 2d 696 (1976). Further, the assertion that the signals would be available over-the-air to any interested subscribers is insufficient grounds for waiver. The Commission's Rules require that all mandatory signals be carried upon request by the cable system. Consequently since carriage of their signals has been requested in this case by KREM-TV and KHQ-TV, the request for waiver to delete these stations will be denied. We note that the third Spokane signal KXLY-TV has not asserted its carriage rights in this proceeding, although it has been served copies of all

pleadings. We do not equate this silence with a lack of interest in its carriage. However since we have no formal record of a carriage request by KXLY-TV, we will serve counsel for Station KXLY-TV with a copy of this letter. Station KXLY-TV will be given fifteen (15) days from the date of this letter to assert its mandatory carriage rights or Quincy Cable will be permitted to delete the signal. A copy of that carriage request, if any, should be sent to the Chief, Cable Television Bureau.

In view of the foregoing, pursuant to Section 0.299(i) of the Commission's rules the petition for special relief, filed by Quincy Cable TV, Inc., is hereby denied.

Sincerely,

/s/ Lauren J. Beluix
Willard R. Nichols, Chief
Cable Television Bureau

cc: R. Russell Eagan, Esq.
Kirkland & Ellis

Edwards W. Hummers, Jr., Esq.
Fletcher, Heald & Hildreth

Arthur Stambler, Esq.
Lovett, Ford & Hennessey, P.C.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

002764

CSR-1678
(WA0295)

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration
Motion for Stay

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1981 Released: August 18, 1981
By the Acting Chief, Cable Television Bureau:

1. On May 28, 1980, Quincy Table TV, Inc. filed a "Petition for Reconsideration" of the Chief, Cable Television Bureau's decision by letter dated April 28, 1980 denying its original "Petition for Special Relief." In its special relief petition, Quincy asked for a waiver of the Commission's mandatory signal carriage rules to delete the carriage of three must-carry stations [KREM-TV (CBS, Channel 2), KXLY-TV (ABC, Channel 4) and KHQ-TV (NBC, Channel 6), all Spokane, Washington] in favor of more diverse programming. In addition to its "Petition for Reconsideration" Quincy simultaneously filed a "Motion for Stay" requesting that the Commission preserve the *status quo* pending resolution of Quincy's reconsideration petition.[1] In its motion, Quincy informed the Bureau that it deleted the carriage of Stations KHQ-TV and KLXY-TV

[1] In view of our decision today based upon the merits of Quincy's reconsideration petition, we are dismissing Quincy's "Motion for Stay" as moot.

on January 5 and 12, 1980, respectively. Stations KREM-TV, KXLY-TV and KHQ-TV have filed oppositions to Quincy's reconsideration petition and "Motion for Stay", to which Quincy has replied. Additionally, on October 23, 1980, Station KHQ-TV filed a "Petition to Institute Forfeiture Proceeding" against Quincy for its failure to carry Station KHQ-TV, to which Quincy has responded.

2. In its reconsideration petition, Quincy argues that the main issue to be resolved in this proceeding is whether or not it should be required to carry three stations which are located approximately 135 miles from the community it serves in lieu of programming which is more diverse. In support of its petition, Quincy contends that in denying its original special relief request, the Chief, Cable Television Bureau applied rules of doubtful constitutional validity interfering with its editorial judgment not to carry the three Spokane, Washington stations in question. In this regard, Quincy maintains that the Commission's mandatory signal carriage rules conflict with the basic protections provided by the First and Fifth Amendments of the Constitution of the United States. Furthermore, Quincy points out that even if a waiver were granted in this proceeding its subscribers would still be able to view the three objecting stations off-the-air since they all broadcast on UHF frequencies, and Quincy's system only utilizes its subscribers television sets' VHF channels.[2]

3. In their oppositions, the objecting stations contend that Quincy's reconsideration petition is procedurally defective and should therefore be dismissed. Basically, the objecting stations assert that the facts relied upon by Quincy in its earlier petition have not changed and since

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[2] Although all three objecting stations operate on VHF frequencies at their city of license, the stations are available to viewers in the community served by Quincy via translators which operate on UHF frequencies.

Quincy has not introduced any new factual evidence, its petition does not meet the requirements set out for reconsideration in Section 1.106(c) of the Commission's Rules. Moreover, the objecting stations argue that since Quincy's constitutional arguments were not raised in its original special relief pleading they should not be considered by the Commission.[3] Substantively, the objecting stations point out that it is undisputed that Section 76.57 of the Commission's Rules require Quincy to carry them. In response to Quincy's constitutional arguments, the objecting stations contend that these same arguments have been rejected by the Commission and the Courts on numerous occasions. In response to Quincy's argument that the three Spokane stations could be received off-the-air in the event a waiver was granted, the objecting stations maintain that this same argument was rejected in the Chief, Cable Television Bureau initial decision, and accordingly, it should not be readdressed at this juncture. Lastly, Station KHQ-TV has requested that the Commission issue a forfeiture directed against Quincy for its alleged willful and repeated failure to comply with Section 76.57(a) of the Commission's Rules, which mandates Quincy's carriage of Station KHQ-TV. Station KHQ-TV also maintains that its signal was illegally discontinued by Quincy on or about January 5, 1980, while Quincy's original petition for special relief was still pending before the Commission.[4]

4. In its reply, Quincy reiterates its argument regarding the availability of the three stations off-the-air. Quincy also contends that it should receive a waiver because none of the objecting stations have demonstrated any special

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[3] In view of the fact that the Bureau is denying Quincy's reconsideration petition based upon its merits, no public interest consideration would be served by the Bureau addressing the procedural issues raised by the objecting parties.

[4] Station KXLY-TV has also requested that the Commission issue a forfeiture against Quincy based upon Quincy's failure to carry it.

efforts to serve the citizens of Grant County, Washington, in which Quincy's cable system is located. In response to the contention that its constitutional arguments are without merit, Quincy maintains that the objecting parties have relied upon a line of cases which have been repudiated by the U.S. Court of Appeals for the District of Columbia Circuit. Lastly, Quincy contends that none of the objecting stations had perfected their must-carry status prior to the filing of its original special relief petition. Consequently, Quincy maintains that the filing of its special relief petition invoked the automatic stay provisions of Section 76.7(g) of the Commission's Rules, and therefore the issuance of a forfeiture is not warranted.

5. After considering the evidence presented, we find Quincy's reconsideration petition to be unpersuasive. In response to Quincy's constitutional arguments, we note that the validity of the Commission's signal carriage rules has previously been challenged on both First and Fifth amendment grounds and has been found to be constitutional. In *Black Hill Video Corp. v. FCC*, 399 F.2d 65 (8th Cir., 1968), the Court specifically considered and rejected a constitutional challenge to the signal carriage rules, holding that "[P]etitioner's contentions that the regulations adopted violate their constitutional rights lack merit." Furthermore, in *United States v. Midwest Video Corp.*, 406 U.S. 659, n. 17 (1972), the Supreme Court of the United States cited *Black Hills, supra,* in concluding that the rules had been ". . . correctly upheld by the courts of appeal as within the guidelines of [*United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)]." The Supreme Court reconfirmed the above finding regarding the current signal carriage rules at note 16 of its decision in *Federal Communications Commission v. Midwestern Video Corporation et al.*, 440 U.S. 689 (1979).

6. Additionally, Quincy contends that should a waiver be granted the objecting stations would nevertheless still be

available off-the-air by means of a switching device on its subscribers' television sets. In the *First Report and Order in Docket 14095,* 38 FCC 683, 702 (1965) the Commission considered allowing cable operators to fulfill their must-carry obligations by means of an off-the-air switch but concluded that such an approach would not be in the public interest. See also *Second Report and Order in Docket 14895,* FCC 66-620, 2 FCC 2d 725 (1966). Lastly, Quincy maintains that a waiver is warranted because none of the objecting must-carry stations have shown that they have made a special effort to serve Quincy's subscribers. However, the Commission has held that such a showing need not be made by a must-carry station requesting carriage on a local cable television system. See *Fetzer Cablevision* (Kalamazoo, Michigan), FCC 75-12, 50 FCC 2d 737 (1975).

7. In regard to the requested forfeiture, Stations KHQ-TV and KXLY-TV's main contention is that Quincy violated the Commission's must-carry rules when it deleted its carriage of Stations KHQ-TV and KXLY-TV in the midst of its pending request for special relief. However, a review of the sequence of events in the matter reveals that Quincy did not in fact violate the must-carry rules when it deleted the two stations. The signal carriage rules at Section 76.57 (a) state in pertinent part that "Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of: . . ." Consequently, no station is an automatic "must carry" station. To acquire must-carry status a station must first assert its right by formally requesting carriage on the relevant cable system. Long term carriage, in itself, does not establish such carriage rights. In the instant case, none of the Spokane signals had asserted their carriage rights on the Quincy system as of the time Quincy initially filed its special relief petition. The objections filed to Quincy's original petition for special relief by Station KREM-TV and KHQ-TV, which the Commission construed to be these stations' request for carriage, were filed after Quincy's deletion of

both stations and subsequent to the filing of Quincy's original petition for special relief. Indeed, KXLY-TV asserted its carriage rights only after the Commission requested it do so, upon the denial of Quincy's special relief petition.

8. In view of the above, we find that Quincy's filing of its original petition for special relief invoked the automatic stay provisions of Section 76.7 of the Commission's rules. Consequently, the imposition of a forfeiture against Quincy for its failure to carry Stations KHQ-TV and KXLY-TV would not be appropriate. However, it is well settled that the mere filing of a petition for reconsideration does not toll the operation of an order. See *e.g.* Section 1.102(b)(2) of the Commission's Rules. Therefore, its petition for reconsideration having failed, Quincy shall be ordered to resume carriage of Stations KREM-TV, KXLY-TV and KHQ-TV within ten days after the release date of this opinion, and it shall advise the Bureau within twenty days of the release date of this opinion that it has in fact resumed carriage of the above three stations.[5] Although these requirements will necessitate that Quincy act promptly to restore carriage of the above stations, it is noted that such compliance periods are neither unprecedented (See *e.g., Willmar Video, Inc.* (Willmar, Minnesota), FCC 68-439, 12 FCC 2d 612 (1968) or unjust—particularly in view of the fact that Quincy should already be in compliance with the terms of the previous order. Quincy is hereby cautioned that failure to comply in the manner indicated will subject the system to the institution of forfeiture proceedings pursuant to Section 503(b) of the Communications Act, as amended, and Section 1.80 of the Commission's rules. In addition, we note that pursuant to Section 503(b)(2) and

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[5] It is unclear from the pleadings whether or not Quincy dropped its carriage of Station KREM-TV. In the event Quincy is not presently carrying Station KREM-TV, Quincy is ordered pursuant to this decision to reinstate its carriage of this station.

Section 1.80(b)(2) of the Commission's Rules, each day of the continuing violation may constitute a separate finable offense. However, in view of the fact that Quincy is expected to promptly achieve compliance with the Bureau's April 28, 1980, decision, the Bureau does not intend to institute forfeiture proceedings at this time for any failure to comply to date.

In view of the foregoing, we find that grant of the above-captioned petition for reconsideration would not be in the public interest.

Accordingly, pursuant to authority delegated by Section 0.288(i) of the Commission's Rules, IT IS ORDERED, That the "Petition for Reconsideration" filed by Quincy Cable TV, Inc., directed against the Chief, Cable Television Bureau's decision released April 28, 1980, IS DENIED.

IT IS FURTHER ORDERED, pursuant to authority delegated by Section 0.288(i) of the Commission's Rules, That Quincy Cable TV, Inc. shall resume carriage of Stations KREM-TV, KXLY-TV and KHQ-TV within ten (10) days after the release date of this order, and shall notify the Chief, Cable Television Bureau of its carriage of Station KALB-TV within twenty (20) days after the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

/s/ WILLIAM H. JOHNSON
William H. Johnson, Acting Chief
Cable Television Bureau

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
September 2, 1981

In reply refer to 4410-RP

John Cole, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

In re: *Quincy Cable TV, Inc.*
Quincy, Washington
WA0295
CSR-1678

Dear Mr. Cole:

We are in receipt of your letters of August 20, 26, and 27, 1981, in which you request the Chief, Cable Television Bureau to rescind or withdraw the Bureau's decision in Quincy Cable TV, Inc. (Quincy, Washington) Mimeo No. 002764, released August 18, 1981.

In the above decision, the Chief, Cable Television Bureau, acting pursuant to delegated authority, denied the "Petition for Reconsideration" you filed on behalf of your client, Quincy Cable TV, Inc. By denying Quincy's reconsideration petition, the Chief, Cable Television Bureau upheld the initial decision which denied Quincy's special relief request that it be relieved of its obligation to carry three must carry television stations. Furthermore in its reconsideration decision, the Bureau concluded that Quincy had an obligation to carry the three stations at issue commencing from the time of the effective date of its initial decision. Lastly, in the expectation that Quincy would in the future voluntarily come into compliance with the Commission's signal carriage rules, the Bureau granted Quincy a ten day

period within which it was to commence carriage of the three must carry stations or face appropriate administrative sanctions.

In your letter of August 20, 1981, you maintain that the Bureau's action of granting Quincy ten days to come into compliance with the Commission's rules is in direct conflict with the provisions of Section 408 of the Communications Act of 1934 which provides for a thirty day period. Moreover, you allege that the "automatic" stay provisions of Section 76.7(g) of the Commission's rules precluded the Bureau's finding, in its reconsideration decision, that Quincy had an obligation to carry the three stations in question subsequent to the Bureau's initial decision. In this regard, you allege that under the provisions of Section 76.7(g) of the Commission's Rules, Quincy's filing of a stay petition contemperanously with its reconsideration petition relieved it from its obligation of carrying the three must carry stations during the pendency of its reconsideration petition.

In your letter of August 27, 1981, you state that Quincy intends to file a "Petition for Review" of the Bureau's actions in this proceeding before the Commission. Consequently, you have requested that the Bureau stay its previous orders pending the outcome of Quincy's review petition.

In view of the fact that Quincy has failed to make the requisite showing necessary for the issuance of a stay under the precedent set in *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958), the Bureau has no basis upon which a stay can be issued in this proceeding. Moreover, since the Commission's rules prohibits the filing of a reconsideration of a denial of a reconsideration petition the other issues raised in your letters should be argued before the Commission in the context of Quincy's review petition. See *Durfee's TV Cable Co.* (Parkersburg, West Virginia), FCC 68-222, 11 FCC 2d 979 (1968).

The above action is taken pursuant to delegated authority under Section 0.288(i) of the Commission's Rules.

Sincerely,

/s/ WILLIAM H. JOHNSON
William H. Johnson, Acting Chief
Cable Television Bureau

cc: Russell Eagan, Esq.
Arthur Stambler, Esq.
Edward Hummers, Jr.

FCC 82-193
QUINCY IV

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CSR-1678
(WA0295)

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Application for Review
Motion for Stay

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1982; Released: May 5, 1982

BY THE COMMISSION: COMMISIONERS JONES AND RIVERA CONCURRING IN THE RESULT.

Introduction

1. On November 27, 1979, Quincy Cable TV, Inc., requested a waiver of Section 76.57 of the rules (the cable television mandatory signal carriage rules) in order to delete from its cable system in Quincy, Washington three television broadcast signals.[1] Quincy argued that the signals

[1] The three television stations are KREM, KHQ-TV, and KXLY-TV, licensed to Spokane, Washington. Stations KHQ-TV, KXLY-TV and KREM-TV are entitled to mandatory carriage on the Quincy cable system pursuant to Section 76.57(A)(4) of the Commission's Rules since they are significantly viewed in Grant County, Washington, the county in which Quincy's cable system is located. Furthermore, Stations KHQ-TV and KXLY-TV are also entitled to mandatory carriage pursuant to Section 76.57(a)

in question could be received over-the-air without cable so that carriage was unnecessary and that the channels occupied by these signals were needed to carry alternative programming not otherwise carried on the system. This petition was denied by the Chief, Cable Television Bureau in a decision adopted under delegated authority.[2] *Quincy Cable TV, Inc.* (Quincy, Washington), action of April 28, 1980, Public Notice released May 2, 1980. Quincy then sought reconsideration of this decision, urging that the rules in question conflicted with the First and Fifth Amendments to the Constitution. That reconsideration petition was also denied under delegated authority. *Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, released August 18, 1981, (hereinafter "*Order*"). Also denied for failure to make the showing required by *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958), was a request for stay of that decision.

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(2) of the Commission's Rules since their signals are carried by 100 watt translator stations, K83AJ and K77AO, respectively, which serve the community of Quincy, Washington. All three stations were being carried at the time Quincy's waiver petition was filed. However, none of the stations had perfected its mandatory carriage rights by making a formal request for carriage on the Quincy system. After filing for waiver, Quincy deleted the signals of Stations KHQ-TV and KREM from carriage. Stations KHQ-TV and KREM subsequently filed oppositions to Quincy's waiver request, which the Cable Television Bureau construed as those stations' formal request for carriage. Station KXLY-TV did not file an opposition. Apparently, Quincy did not delete that station from carriage.

[2] More specifically, the decision denied Quincy's request for special relief to delete Stations KHQ-TV and KREM. The decision also stipulated that Quincy's request for waiver to delete carriage of Station KXLY-TV was similarly denied unless that station failed to make a formal request for carriage by May 13, 1980. KXLY-TV filed its formal request on May 7, 1981.

2. Now pending is a petition for review of the Bureau Chief's *Order* denying reconsideration of Quincy's waiver request. KHQ, Inc., licensee of Station KHQ-TV (NBC, Channel 6), and King Broadcasting Co., licensee of Station KREM-TV (CBS, Channel 2), both licensed to Spokane, Washington, have opposed this petition.[3]

Summary of Arguments

3. In support of its petition for review, Quincy maintains that the Cable Television Bureau's *Order* is both substantively and procedurally defective. Substantively, Quincy first contends that the Commission's mandatory signal carriage rules are impermissible under the 1st and 5th Amendments of the Constitution of the United States. Quincy also argues that the courts recently have discredited the constitutionality of the signal carriage rules and, consequently, the Commission's ability to impose such regulations. Therefore, Quincy argues, the Bureau cited case law which either

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[3] Quincy has additionally filed a motion to stay the effectiveness of the Cable Television Bureau's *Order* pending the outcome of this proceeding. In light of our action today denying Quincy's petition for review, we are dismissing its motion for stay as moot under Section 1.102(b)(3) of the Rules. On October 2, 1981, Quincy filed a "supplement" to its petition for review to request that the Commission additionally examine the merits of the Bureau's September 2, 1981 decision declining to reconsider its own Reconsideration decision. Station KHQ-TV filed an opposition to Quincy's supplement, to which Quincy did not reply. Station KREM-TV filed a motion to strike Quincy's supplement, which Quincy opposed, and a reply to Quincy's opposition. Station KXLY-TV also opposed Quincy's supplement and, in addition, requested that forfeiture proceedings be initiated against Quincy for its failure to comply with the signal carriage rules. Quincy filed a response to Station KXLY-TV's opposition and request for forfeiture. In view of our decision today to affirm the Cable Television Bureau's *Order*, we are dismissing Quincy's request for review of the Bureau's September 2, 1981 letter as moot.

has been repudiated or is inapposite to the constitutional issues raised. Second, Quincy contends that even assuming *arguendo* the constitutionality of the Commission's mandatory signal carriage rules, the Bureau erred in denying its waiver request. Quincy maintains that it already carries three network stations licensed to Seattle, which its subscribers prefer to view; that its subscribers have no interest in viewing the Spokane stations; and that the Spokane stations broadcast signals of inferior technical quality. Quincy contends that these factors should relieve it of any obligation to carry the Spokane stations. Therefore, Quincy maintains that adequate substantive grounds exist to warrant Commission reversal of the Cable Television Bureau's *Order*.

4. Procedurally, Quincy contends that the Bureau's *Order* is defective in three respects. First, Quincy maintains that the Bureau incorrectly interpreted the "automatic stay" provisions of Section 76.7(g) of the Commission's Rules.[4]. Quincy contends that the Bureau's *Order* erroneously found that the stay provisions of Section 76.7(g), which relieve Quincy of any obligation to carry the Spokane signals, terminated when Quincy's original waiver petition was denied by the Bureau. Instead, Quincy argues that the "automatic stay" provisions are effective in all "further proceedings" regarding its waiver request and, in fact, do

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[4] Section 76.7(g) reads, in pertinent part, that "Where a petition for waiver of Section 76.57(a) . . . is filed within fifteen (15) days after a request for carriage, a system community unit need not carry the signal of the requesting station pending the Commission's ruling on the petition or the question of temporary relief pending further proceedings." Although Quincy's petition was filed prior to the Spokane stations' request for carriage, the Cable Television Bureau determined that adequate justification existed for finding that Quincy had invoked the automatic stay provisions of Section 76.7(g). See discussion at paragraphs 7-8, *Order*. Quincy does not dispute this finding.

not terminate until the Commission itself renders a final administrative decision in this matter. Consequently, Quincy maintains that it is not under any obligation to carry the deleted Spokane signals unless the Commission itself so orders. Secondly, Quincy contends that the Bureau erred in dismissing its motion for stay as moot. In this regard, Quincy maintains that its purpose in requesting a stay of the Bureau's April 28, 1980 letter decision was to protect its constitutional rights from irreparable injury. Consequently, Quincy argues that by failing to consider this request separately, the Bureau denied it due process. Finally, Quincy contends that the Cable Television Bureau violated Section 408 of the Communications Act by directing Quincy to resume carriage of the Spokane stations within ten days of the *Order*'s August 18, 1981 release date. Quincy states that the language of Section 408 explicitly mandates that no order of the Commission shall be effective until at least 30 days have elapsed after its service. Here, Quincy argues, it was required to achieve compliance with the signal carriage rules by August 28, 1981, even though it was not served with a copy of the *Order* which mandated this compliance until September 2, 1981, four days later. Therefore, Quincy maintains, the Bureau's *Order* is unlawful and void for its inadequate notice.

5. In their oppositions to Quincy's petition for review, the objecting stations contend that Section 76.57 of the Rules clearly requires Quincy to carry their signals and that none of the arguments Quincy advances obviates its obligation to comply with the Commission's Rules. In response to Quincy's constitutional arguments, the objecting stations maintain that the Bureau's *Order* correctly determined that identical 1st and 5th Amendment challenges to the mandatory signal carriage rules have been rejected repeatedly by both the Commission and the Courts. The objecting stations additionally contend that Quincy's procedural arguments are without merit. First, they argue that

the Bureau's *Order* correctly determined that the "automatic stay" provisions of Section 76.7(g) were terminated by the Bureau's action denying Quincy's original petition for waiver. Thus, the objecting stations maintain, Quincy is in violation of Commission rules for failing to reinstate carriage of their "must carry" signals after that action. Second, the objecting stations argue that since actions on motions for stay are discretionary under Commission Rules, the Bureau's action to dismiss Quincy's request did not deprive it of any "interest" or entitlement protected by the 5th Amendment. Third, the objecting stations contend that the Bureau's ten day ordering clause was in full compliance with the Communications Act and the Commission's Rules.

Discussion

6. Having carefully examined the pleadings before us, we conclude that Quincy has raised no arguments in its petition for review which would warrant our reversing the Cable Television Bureau's *Order* on either procedural or substantive grounds. We turn first to the procedural arguments Quincy raises. Quincy argues that the language of Section 76.7(g) explicitly provides that it need not carry the Spokane stations until the Commission itself makes a final decision on the merits of its waiver petition. Quincy further contends that since the "automatic stay" provisions of Section 76.7(g) are still in effect, the Bureau erred in finding that Quincy was not in compliance with the mandatory signal carriage rules for its failure to carry all three Spokane stations after the Bureau denied its initial waiver petition (*Order*, at paragraph 8). Both of these contentions are without merit. The Commission has promulgated Rules which delegate authority to its staff pursuant to Section 5(d) of the Communications Act of 1934, as amended.[5] In Sections 0.201(a)(1) and 0.288(i) of the Rules,

[5] Sections 0.201 to 0.387 of the Rules were issued under authority

the Commission has provided the Chief, Cable Television Bureau, with delegated authority to act on petitions for waiver of the Commission's cable television regulations. The Commission has additionally provided the Chief, Cable Television Bureau, in Sections 0.204(a) and (d) of the Rules, with the authority to exercise this delegated authority by issuing orders, decisions, or other action documents as letters or captioned orders. Finally, Section 0.203 confers upon the Chief, Cable Television Bureau, "... all the jurisdiction, powers, and authority conferred by law upon the Commission," and expressly provides that:

> Except as provided in Section 1.102 of this chapter, any action taken pursuant to delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission.[6]

7. In light of the foregoing, we find that the Chief, Cable Television Bureau's letter decision in *Quincy Cable TV, Inc.* (Quincy, Washington), action of April 28, 1980, Public Notice released May 2, 1980, must be construed as having the "same force and effect" as an action by the Commission itself on Quincy's waiver request. The Bureau's decision denied Quincy's request to delete Stations KHQ-TV and KREM. This decision additionally stipulated that Quincy's request for a waiver to delete Station KTXL-TV was denied if that station filed a formal request for car-

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of Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, and are found at "Subpart B—Delegations of Authority," in Part 0 of the Rules on Commission Organization.

[6] Section 1.102(b)(3) gives the Commission the discretion to stay certain delegated actions pending Commission review. As indicated in note 1, *supra*, we do not find that a stay of the Bureau's decision is appropriate.

riage by May 13, 1980.[7] Pursuant to Section 1.102(b)(1) of the Commission's Rules, this letter decision respecting Stations KHQ-TV and KREM became effective on May 2, 1980, the date public notice of the Bureau's action was released.[8] On that date, the automatic stay provisions of Section 76.7(g) terminated. Thus, as of May 2, 1980, Quincy was obligated to comply with the Commission's mandatory signal carriage rules by carrying Stations KHQ-TV and KREM on its system. Quincy has not resumed carriage of those stations. Therefore, Quincy has been in violation of the Commission's mandatory signal carriage rules since May 2, 1980.

8. We additionally find no merit in Quincy's allegation that it was denied due process by the Chief, Cable Television Bureau's action of dismissing its motion for stay as moot (*Order*, at note 1). In this regard, Quincy contends that since it petitioned for a stay to protect its constitutional rights from irreparable injury, the Bureau erred when it failed to consider the merits of its request. We find that Quincy was not denied due process when the Bureau dismissed its request for stay. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Here, Quincy based its claim of irreparable injury in its motion

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[7] Station KXLY-TV timely filed its formal request for carriage on May 7, 1981.

[8] Section 1.102(b)(1) provides: "Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question." Accordingly, pursuant to stipulation by the Chief, Cable Television Bureau, on May 7, 1980, the date that Station KXLY-TV made its formal request for carriage, Quincy's request to delete KXLY-TV's signal was also denied.

for stay on allegations that the mandatory signal carriage rules violated its constitutional rights. Quincy raised the identical constitutional arguments against the Commission's mandatory signal carriage rules in its petition for reconsideration. The Bureau's *Order* directly addressed the constitutional issues that Quincy raised in its reconsideration petition. (*Order,* at paragraph 5). Since the Commission's mandatory signal carriage rules have been upheld as not constituting a violation of liberty or property rights under the 1st and 5th Amendments, the Bureau correctly rejected Quincy's arguments in its *Order* denying Quincy's reconsideration petition.[9] Accordingly, the allegations of irreparable injury which formed the basis for Quincy's motion for stay had no merit, and the Bureau appropriately dismissed Quincy's motion under Section 1.102(b)(2) of the Rules.[10] Therefore, we find Quincy's contention that it was deprived of liberty or property interests without fair hearing to be wholly without merit.[11]

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[9] See discussion at paragraphs 10-13, *infra.*

[10] Section 1.102(b)(2) of the Rules provides that if a party files for reconsideration of a non-hearing action taken pursuant to delegated authority the "designated authority"—here, the Chief, Cable Television Bureau—may exercise discretion over grant of a stay pending disposition of the reconsideration petition.

[11] Quincy had also raised questions relating to whether the Bureau's order requiring compliance with the mandatory signal carriage rules by August 23, 1981 (ten days after the release of the order), was in conflict with Section 408 of the Communications Act. Because more than seven months have now passed during which Quincy has continued not to comply with the requirements of the mandatory signal carriage rules, a resolution of this question is not now necessary. It should be noted, however, that Quincy's obligation to carry the signals here in question derives from the rules themselves and that the order in question had the effect of extending, rather than reducing, the time for its coming into compliance.

9. Quincy's procedural arguments having failed, we now turn to consider the susbtantive arguments raised by Quincy. First, Quincy contends that the Commission's mandatory signal carriage rules are unconstitutional. Quincy argues that these rules violate its 1st Amendment right to exercise discretion over the programming it offers to subscribers and restrict its cable subscribers' right to receive discretionary, non-mandatory signals. In a similar vein, Quincy maintains that the mandatory signal carriage rules abridge its 5th Amendment rights. Quincy argues these rules have not been upheld by the courts, contrary to the Bureau's claim, and that the Court of Appeals and Supreme Court decisions relied upon by the Bureau are not on point.[12] Finally, Quincy contends that the constitutionality of the Commission's cable signal carriage rules has been discredited by *Midwest Video Corp. v. FCC,* 571 F. 2d 1025, 1048 (8th Cir. 1978), and by *Home Box Office, Inc. v. FCC,* 567 F. 2d 9, n. 80 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 829 (1977).

10. We are not persuaded by Quincy's arguments. Contrary to Quincy's assertions, both the Court of Appeals for the Eighth Circuit and the Supreme Court have not only affirmed the Commission's jurisdiction to impose signal carriage restrictions on cable systems but have also affirmed the substantive validity of those regulations. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968), addressed a similar challenge to the Commission's jurisdiction to promulgate cable television regulations. The Supreme Court found that the Commission had reasonably deter-

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[12] This case law, which the Bureau cited at paragraph 5 of its *Order,* is: *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968); *Black Hills Video Corporation v. FCC,* 399 F. 2d 65 (8th Cir. 1968); *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972); and *Federal Communications Commission v. Midwestern Video Corp., et al.,* 440 U.S. 689 (1979).

mined that cable system signal carriage restrictions were necessary in order for the Commission to discharge its statutory responsibilities under the Communications Act of 1934, as amended, to promote the development of a system of television broadcast stations capable of serving as outlets for local self-expression. 392 U.S. at 173-175. Therefore, the Court held that the Commission had the authority to impose cable regulations that are "reasonably ancillary to the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. While the substantive validity of the Commission's mandatory signal carriage rules under the 1st and 5th Amendments was not before the Supreme Court in *Southwestern*, free expression and eminent domain issues were directly raised in another challenge to the 1966 signal carriage rules which was pending at the time *Southwestern* was decided. In *Black Hills Video Corporation v. FCC*, 399 F. 2d 65, 69-70 (8th Cir. 1968), the Court of Appeals found that the mandatory signal carriage rules were within the scope of the Commission's jurisdiction, as delimited by the Supreme Court in *Southwestern*, and expressly rejected arguments that signal carriage restrictions violate cable operators' 1st and 5th Amendment rights.

11. Furthermore, although the Supreme Court has not specifically addressed challenges to the Commission's mandatory signal carriage regulations since *Southwestern*, the Court has reconfirmed these cable rules on two separate occasions. In *United States v. Midwest Video Corp.* (*"Midwest I"*), 406 U.S. 649 (1972), the Supreme Court examined the Commission's authority to impose cablecasting requirements on cable television systems. In finding that cablecasting requirements were within the "reasonably ancillary" guidelines of *Southwestern*, the Court noted that:

> *Southwestern* reviewed, but did not specifically pass upon the validity of the [signal carriage] regulations.

> See 392 U.S., at 167. Their validity was, however, subsequently and correctly upheld by courts of appeal as within the guidelines of that decision. See, e.g., *Black Hills Video Corp. v. FCC*, 399 F. 2d 65 (8th Cir. 1968).

406 U.S. at n. 17 (1972). Secondly, in *Federal Communications Commission v. Midwestern Video Corporation, et al. ("Midwest II")*, 440 U.S. 689 (1979), *granting cert. to Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), the Court addressed an analogy made by the Commission between the mandatory signal carriage rules at issue in *Southwestern* and the leased access channel question before it. The Court rejected the Commission's argument that the Commission's authority to impose access channel requirements on cable systems was consistent with its authority, upheld in *Southwestern*, to impose mandatory signal carriage regulations. However, in so doing, the Court distinguished the mandatory signal carriage rules and reconfirmed their validity. 440 U.S. at n. 16. In light of the above, we are not persuaded by Quincy's allegation that the Bureau's reliance on these cases was misplaced.

12. Moreover, we are not persuaded by Quincy's claim that the mandatory signal carriage rules have been repudiated by the Court of Appeals' decision in *"Midwest II."* As noted in the paragraph above, the Supreme Court's certiorari decision in *"Midwest II"* subsequently reconfirmed the validity of the Commission's signal carriage rules. Nor are we persuaded by Quincy's claim that *Black Hills'* affirmation of the constitutionality of the mandatory signal carriage rules has been discredited by *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, n. 80 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). In fact, the Court of Appeals, at note 80 of its decision, rejected *Black Hills* only as authority to support the constitutionality of the Commission's pay cable and cablecasting rules and explicitly distinguished those rules from the Commission's signal car-

riage rules, which it characterized as "constitutionally permissible public control over broadcast signals . . ." 567 F. 2d at 44-45. Therefore, we find that the Bureau's rejection of Quincy's constitutional arguments was substantiated by legal precedent. The Commission itself has previously found precisely the same 1st and 5th Amendment challenges to the mandatory signal carriage rules as raised by Quincy to be unpersuasive. See *Daniels Properties, Inc.* (Nolanville, Texas), FCC 77-557, 65 FCC 2d 653, 655-656 (1977); *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 75-389, 52 FCC 2d 576, 578-579 (1975).

13. Finally, we turn to consider Quincy's contention that it should have been granted a waiver of the mandatory signal carriage rules. In the case before us, each of the Spokane stations is significantly viewed in Grant County, Washington, where Quincy's cable system is located, and therefore they have mandatory carriage rights on Quincy's cable system, upon request, under the provisions of Section 76.57(a)(4) of the Rules. In addition, Station KHQ-TV and Station KXLY-TV are entitled to mandatory carriage pursuant to Section 76.57(a)(2) of the Commission's Rules since their signals are carried by 100-watt translator stations, K83AJ and K77AO, respectively, which serve Quincy, Washington. The licensee of each station at issue has made a formal request for carriage on the Quincy system. Thus, absent a waiver, Quincy is obligated to carry the Spokane stations or in the case of Stations KHQ-TV and KXLY-TV their translator stations. To support its request for waiver of the mandatory signal carriage rules, Quincy must make a compelling showing, with specific factual evidence, that our granting its request would be in the public interest. *Marin Cable Television, Inc.* (Sausalito, California), FCC 76-217, 58 FCC 2d 1085 (1976).

14. We find that Quincy has failed to meet its burden of proof for waiver. Thus, the Bureau correctly determined that Quincy should be required to comply with the Com-

mission's mandatory signal carriage rules. We are not persuaded that a waiver is warranted based solely on Quincy's mere allegations, unsupported by any demonstration of proof, that the technical quality of the Spokane stations is inferior. The measurement procedures used to establish signal quality must either be reliable and precise in accordance with sound engineering practice or follow procedures consistent with the Commission's Rules specified in Section 73.686(c)[13] and the 1959 Television Allocations Study Organization (TASO) report to the Commission.[14] *David A. Adams CATV Cable* (Waymart, Pennsylvania), FCC 78-847, 70 FCC 2d 649 (1979); *Staunton Video Corp.* (Staunton, Virginia), FCC 75-328, 52 FCC 2d 602 (1975). Neither are we persuaded by Quincy's contentions that its obligation to comply with the mandatory signal carriage rules is vitiated because it already carries three network stations on its system, because its subscribers may receive the Spokane translator stations over-the-air on their UHF terminals, or because its subscribers allegedly have no interest in viewing the Spokane signals. We have consistently found that these same arguments are insufficient to overcome the policies of our mandatory signal carriage rules. See, e.g., *Pioneer Cablevision Corp.* (Endicott, New York), FCC 75-40, 50 FCC 2d 821 (1975); *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 74-1113, 49 FCC 2d 283 (1974), *recons. denied*, FCC 75-389, 52 FCC 2d 576 (1975); *Hoosier Telecable Corp.* (Peru, Indiana), FCC 73-1003, 43 FCC 2d 248 (1973).

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[13] Section 73.686(a) states that:

> . . . In instances where a showing of the measured level of a signal prevailing over a specific community is appropriate, the procedure for making and reporting field strength measurements for this purpose is set forth in paragraph (c) of this section.

[14] *Television Allocations Study Organization, Final Report of Committee 4.1 on Measurement of Service Fields*, 280 (1959).

15. A primary objective of the Commission in adopting the mandatory signal carriage rules was to assure that local television stations are carried on cable systems and are allowed access to the audience they are licensed to serve. Paragraph 78, *Cable Television Report and Order,* 36 FCC 2d 143, 173 (1972); *Concord TV Cable* (Concord, California), FCC 75-1342, 58 FCC 2d 1178 (1975). It is for this reason that our signal carriage policy provides that mandatory signals have carriage priority over non-mandatory signals. *MBS Cable TV, Inc.* (Carrollton, Ohio), FCC 76-553, 59 FCC 2d 1181 (1976). Here, Quincy does not dispute the fact that the three Spokane signals are the only signals entitled to mandatory carriage on its system. Nor does Quincy dispute the fact that after deleting two of these mandatory signals, it saturated its channels with non-mandatory signals. Rather, the gravamen of Quincy's objections to resuming carriage of the deleted signals appears to be a complaint that since its channel capacity is now completely occupied, adding the Spokane stations will force it to delete carriage of non-mandatory programming. We find Quincy's objections without merit. The Commission's Rules do not *per se* require Quincy to delete non-mandatory programming in order to carry mandatory signals. Rather, our cases have consistently held that a cable system whose channels are completely occupied may exercise discretion in fulfilling its signal carriage obligations by deleting a non-mandatory signal, by expanding its channel capacity or, where appropriate, by composite carriage. See, e.g., *Cable-Vision, A Division of American Television and Communications Corp.* (Lafayette, California), FCC 77-633, 66 FCC 2d 317 (1977); *Concord TV Cable* (Concord, California), FCC 75-1342, 58 FCC 2d 1178 (1975); *Liberty TV Cable, Inc.* (Novato, California), FCC 75-546, 53 FCC 2d 275 (1975). Moreover, by filing its petition for waiver, Quincy implicitly recognized its obligation under the Commission's Rules to carry the Spokane signals. Hence, it acted at its own risk in saturating its channel capacity

with non-mandatory signals after it deleted the mandatory Spokane signals from carriage. *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 75-389, 52 FCC 576, 578-579 (1975). Thus, we concur with the Cable Television Bureau's finding that Quincy is required to comply with the Commission's mandatory signal carriage rules by reinstating carriage of the mandatory Spokane signals it has deleted from carriage.

16. In light of the foregoing, we reject Quincy's substantive and procedural challenges to the Cable Television Bureau's decision in *Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, released August 18, 1981, and affirm that decision in its entirety. Accordingly, we do not find that a grant of Quincy's petition for review is in the public interest. Finding that denial of the requested waiver was both procedurally and substantively correct, that the constitutional questions raised were not new or novel, and that the waiver denial was neither automatically stayed by virtue of the petitions for reconsideration or review, nor specifically stayed by decision of the Commission, we conclude that Quincy Cable TV, Inc.'s failure to carry the signals of Stations KHQ-TV and KREM following denial of its waiver request represents a clear and continuing violation of Section 76.57 of the Commission's Rules. Quincy Cable TV, Inc., moreover, was specifically placed on notice that continuation of this violation could result in the imposition of a forfeiture. (*Order,* at paragraph 8). Accordingly, having considered the nature of the violation involved, the duration of the violation (from at least September 17, 1981, to the present), and the size of the systems involved, we are directing the Chief, Cable Television Bureau to issue a Notice of Apparent Liability for forfeiture to Quincy Cable TV, Inc. in the amount of $5,000 for its violations of Section 76.57(a) of the Rules.

Accordingly, IT IS ORDERED, That the "Application for Review" (CSR-1678) filed by Quincy Cable TV, Inc.,

on September 17, 1981, IS DENIED.

IT IS FURTHER ORDERED, That the "Application f · Review" filed by Quincy Cable TV, Inc., on October 2, 1981, IS DISMISSED pursuant to note 3, *supra.*

IT IS FURTHER ORDERED, That the "Motion for Stay" filed by Quincy Cable TV, Inc., on September 1981, IS DISMISSED pursuant to note 3, *supra.*

IT IS FURTHER ORDERED, That the Chief, Cable Television Bureau, IS DIRECTED to issue a Notice of Apparent Liability for Forfeiture in the amount of $5,000 to Quincy Cable TV, Inc., for its violations of Section 76.57 (a) of the Commission's mandatory signal carriage rules.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 83-60
32753

QUINCY V

(See dissenting statement of Commissioner Jones)

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1983 Released: February 17, 1983

By the Commission:

Introduction

1. On April 28, 1980, the Chief of the Cable Television Bureau, pursuant to delegated authority, denied a petition for waiver of the cable television mandatory broadcast signal carriage rules (Section 76.57 of the Commission's Rules) filed by Quincy Cable TV, Inc. (hereinafter "Quincy"), of Quincy, Washington.[1] Quincy thereafter did not comply with the rules but filed petitions for stay and for reconsideration,[2] and subsequently for review by the full

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[1] *In re Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter *"Quincy I"*].

[2] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter *"Quincy II"*]; *In re*

Commission. The Commission affirmed the decisions of the Bureau Chief and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating that the filing of stay, reconsideration, and waiver petitions does not automatically stay the effect of a decision taken under delegated authority.[3]

2. Now pending are a series of pleadings relating to this, including: (1) letters dated May 14, 1982, and May 25, 1982, to Chairman Fowler;[4] (2) Quincy's "Petition for Reconsideration"; and (3) oppositions from KHQ, Incorporated (hereinafter "KHQ-TV"); from King Broadcasting Company (hereinafter "KREM-TV"); and from Spokane Television, Inc. (hereinafter "KXLY-TV"), who are, respectively, the licensees of Stations KHQ-TV (NBC, Channel 6), KREM-TV (CBS, Channel 2), and KXLY-TV (ABC, Channel 4), all Spokane, Washington; and (4) Quincy's reply thereto.

3. Although Quincy reiterates and continues certain arguments concerning the validity of the mandatory signal carriage rules themselves,[5] and relating to the denial of its

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Quincy Cable TV, Inc. (Quincy, Washington) (adopted September 2, 1981) [hereinafter *"Quincy III"*].

[3] *Quincy Cable TV, Inc.* (Quincy, Washington), FCC 82-193, 89 FCC 2d 1128 (1982) [hereinafter *"Quincy IV"*].

[4] KREM-TV and KXLY-TV each filed a "Motion to Strike" Quincy's May 14, 1982, letter on, respectively, May 17 and May 18, 1982. These motions will be denied. While arguably irregular, we cannot say that the filing of Quincy's May 1982 letters has prejudiced any party to this proceeding.

[5] In a "Motion for Expedited Determination" filed July 8, 1982, Quincy raises an additional constitutional challenge to the mandatory signal carriage rules, claiming that they constitute an unlawful taking of private property in contravention of the fifth amend-

waiver petition, Quincy is now essentially seeking reconsideration of that part of the decision relating to its apparent liability for failure to carry the signals in question after initial denial of its petition. Although the Notice of Apparent Liability referred to KHQ-TV and KREM-TV, it and the *Quincy II* decision should have referred to KHQ-TV and KXLY-TV, both of which Quincy admitted to not carrying. Although it might be inferred that KREM-TV was also not carried, this is not in evidence. Quincy has not argued that this provides any ground for change in the forfeiture proposed, and we do not believe any change is in order since the forfeiture was not based on the particular identity of the signals involved. The essential question here is whether the effectiveness of the Bureau Chief's decision was stayed by the filing of various subsequent pleadings so that no violation could be said to have occurred.

Summary of Pleadings

4. Prior to filing of the instant reconsideration petition, Quincy filed a letter to the Chairman of the Commission on May 14, 1982.[6] In this letter, Quincy contends that the language of Section 76.7(g) of the Rules, which allows a timely filing of, *inter alia*, a petition for waiver of Section 76.57(a) of the Rules to toll the requirements of that rule

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ment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982). We note, however, that the Court continues to distinguish between permanent physical occupations of property, which constitute takings, and ". . . appropriate restrictions upon an owner's *use* of his property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. at 3179, which do not. *See also Black Hills Video Corporation v. FCC*, 399 F.2d 65 (8th Cir. 1968).

[6] The letter was served on all Commissioners; the General Counsel; the Chief of the Cable Television Bureau; and counsels for KHQ-TV, KREM-TV, and KXLY-TV.

". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings," clearly demonstrates that Quincy's progressive filings for stay pending further review have continuously tolled Quincy's obligations to carry the Spokane signals. Quincy asserts that any finding that it has been in violation of Section 76.57(a) of the Rules as early as May 2, 1980, renders Section 76.7(g) of the Rules a nullity. Quincy reiterates its contention that Section 408 of the Communications Act prohibited the Bureau Chief from imposing a ten-day compliance requirement on Quincy in *Quincy II*. Quincy claims that the questions it has raised in these proceedings have been novel, and should not have been decided on delegated authority. Quincy argues that it should not be subject to forfeiture liability in the face of Bureau and Commission silence on Quincy's stay requests. Citing Section 1.108 of the Rules, Quincy suggests that the Commission might on its own motion set aside *Quincy IV*.[7]

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[7] Quincy commented on KREM-TV's and KXLY-TV's motions to strike its letter on May 20, 1982, contending that its letter was procedurally proper. Quincy claims that its letter only addressed the question of the $5,000 forfeiture, which Quincy characterizes as inequitable and unwarranted. Quincy argues that while former Section 74.1109(h) of the Rules referred to "interlocutory" questions of temporary relief pending further "procedurces," the fact that its successor Section 76.7(g) of the Rules did not use the term "interlocutory" and uses the term "proceedings" means that Section 76.7(g) of the Rules allows for stays of signal carriage obligations at least until a final decision subject to judicial review is handed down by the Commission. KREM-TV and KXLY-TV each replied to Quincy's comments on, respectively, May 21, and May 25, 1982. Both KREM-TV and KXLY-TV state that the proper procedure for requesting mitigation or remission of a forfeiture is set forth in Section 1.80(f)(3) of the Rules. On June 11, 1982, Quincy responded to the notice of apparent liability, requesting that action on the notice be held in abeyance pending Commission action on the instant "Petition for Reconsideration." However,

5. On May 25, 1982, Quincy filed another letter to the Chairman. In this letter, Quincy contends that its argument that it is not obligated to carry the Spokane signals is supported by the Administrative Procedure Act (hereinafter "APA"), particularly Sections 551(8), 551(9), and 558(c) of the APA, referring to agency licensing procedures, which Quincy asserts include the Commission's signal registration and carriage rules for cable television systems. Quincy claims that, pursuant to Section 558(c) of the APA, the automatic stay provisions of Section 76.7(g) of the Rules, triggered by Quincy on November 27, 1979, may not be terminated until the Commission issues its final determination in this proceeding.

6. In support of its "Petition for Reconsideration," filed June 4, 1982, Quincy reiterates its prior arguments concerning the automatic stay provisions of Section 76.7(g) of the Rules, Section 408 of the Communications Act, and Sections 551 and 558 of the APA.[8] Quincy further argues that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as a final or an effective order. In addition, Quincy now contends that none of the Spokane stations can assert mandatory carriage rights on Quincy's system. Section 76.57 of the Rules permits such rights to be asserted by a ". . . relevant licensee . . . ." According to Quincy, this does not include the Spokane licensees, whose signals, Quincy claims, neither serve nor reach Quincy, Washington. Quincy asserts that the only over-the-air service available to its community is from the translators which rebroadcast the Spokane signals. These translators are

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upon examination of the thrust of Quincy's arguments on reconsideration, we will herein address the question of Quincy's forfeiture liability, rather than postpone consideration thereof as Quincy requests. *See* Section 1.80(f)(3) of the Rules.

[8] Quincy also argues that the automatic stay represents an "exemption" within the meaning of Section 551(8) of the APA.

licensed to Quincy Valley TV Inc. (hereinafter "Quincy Valley"), which has never requested carriage of its signals. Quincy further argues that Section 312 of the Communications Act requires certain procedures before the Commission may find violation of a rule or regulation, which were not afforded prior to the issuance of *Quincy II* or *Quincy IV*. Quincy challenges the summary disposition of its argument concerning Section 408 of the Communications Act in *Quincy IV* at n. 11, and maintains that the ten-day compliance order of *Quincy II* ". . . is illegal and of no effect."

7. KHQ-TV filed its opposition on June 17, 1982. Initially, KHQ-TV argues that Quincy's petition is procedurally defective, as it alleges no new facts or changed circumstances concerning the signal carriage at issue, and is more properly directed to the notice of apparent liability insofar as it challenges the forfeiture authorized in *Quincy IV*. KHQ-TV contends that Sections 1.102(b)(1), 1.102(b)(3), and 1.115(h)(2) of the Rules clearly indicate that issuance of a stay of an action taken by delegated authority is discretionary on the part of the Commission, and that the Commission in its discretion herein decided not to issue a stay. Accordingly, maintains KHQ-TV, Quincy was obligated to comply with the order of *Quincy II*. KHQ-TV further contends that at this date, Quincy's argument based on Section 408 of the Communications Act has become moot by the passage of time.[9] With regard to Quincy's argument concerning the automatic stay, KHQ-TV argues that were this argument to be accepted, "it would jeopardize the Commission's entire temporary authorization and waiver granting process." In any event, asserts KHQ-TV, *Quincy II* denied any continuance of temporary relief, terminating the automatic stay. KHQ-TV maintains that its status as a significantly viewed signal in Grant County makes it a

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[9] KHQ-TV notes that Quincy apparently resumed carriage of KHQ-TV on June 3, 1982. *See also* note 10, *infra*.

relevant licensee to assert carriage rights, pursuant to Section 76.57(a)(4) of the Rules, as the Commission noted in *Quincy IV* at 1128-1129 n. 1.

8. KREM-TV opposed Quincy's petition on June 17, 1982. KREM-TV notes that it is entitled to be carried on Quincy's system, pursuant to Section 76.57(a)(4) of the Rules. In addition, citing *Friendly Broadcasting Co.* (Cleveland Heights, Ohio), FCC 62-670, 23 RR 2d 893, 897 (1962), KREM-TV contends that the Commission's forfeiture sanctions are separate and distinct from those authorized by Section 312 of the Communications Act. KREM-TV argues that the Commission's forfeiture sanctions are authorized by Sections 501 and 503 of the Communications Act and Section 558(b) of the APA, and characterizes the automatic stay provisions of Section 76.7(g) of the Rules not as a "license" but as "relief" within the meaning of Section 551(11)(c) of the APA. Finally, KREM-TV notes that Quincy was not assessed a forfeiture until after it had been given a chance to comply with *Quincy II* and failed to do so.

9. KXLY-TV opposed Quincy's petition on June 17, 1982. KXLY-TV again argues that Quincy's May 14, 1982 letter should be stricken, as should Quincy's May 25, 1982 letter. KXLY-TV characterizes Quincy's "Petition for Reconsideration" as repetitive, and ". . . limited to . . . strained legalistic contentions. . . ." KXLY-TV asserts that Quincy has misrepresented facts concerning its signal complement from the inception of this proceeding, in the face of which the $5,000 forfeiture imposed is justified. KXLY-TV states that it is the relevant licensee and party-in-interest to request carriage as the Quincy Valley translators rebroadcast the Spokane signals only with their consent. Finally, KXLY-TV contends that Section 312 of the Communications Act is not applicable to Quincy because it is not a broadcast licensee.

10. Quincy filed its "Reply to Oppositions" on June 23, 1982. Quincy claims that neither Commission nor Bureau orders are self-effectuating, even on thirty days' notice, and reiterates its first amendment arguments. In addition, Quincy asserts that, pursuant to Section 704 of the APA, *Quincy II* was inoperative pending review by the Commission, or was subject immediately to judicial review. Absent these safeguards, Quincy maintains, first amendment rights and freedoms would be intolerably deferred. Quincy reiterates its prior arguments challenging the Commission's application of Section 1.102 of the Rules, by which the Commission in *Quincy IV* found *Quincy II* to have been final and effective on release, and contends that Section 1.102 of the Rules is in conflict with Section 408 of the Communications Act.[10]

Discussion

11. To avoid controversy, and to expedite and narrow the issues in this proceeding, the Notice of Apparent Liability was issued only for rule violations commencing on or after May 18, 1981. In the Bureau Chief's *Quincy II* decision, Quincy was ordered to resume carriage of the signals in question within ten days; *i.e.*, by August 28, 1981. Quincy now argues that this order should not have been issued without the type of hearing described in Section 312(c) of

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[10] On July 8, 1982, Quincy filed a "Motion for Expedited Determination." Quincy initially states that it has complied with *Quincy IV*, having ". . . commenced carriage of those Spokane, Washington broadcast station signals, via translators, to the preclusion of other programming of its choice, on June 3, 1982." Quincy again contends that *Quincy II* was not a final nor effective decision, citing, *inter alia*, S. Rep. No. 576, 87th Cong., 1st Sess. 7 (1961), and Sections 5(d)(3) and 5(d)(4) of the Communications Act.

the Communications Act[11] first having been held, and also that, pursuant to Section 408 of the Communications Act,[12] no order should have specified an effective date less than 30 days from service of it on Quincy. Since the forfeiture notice issued was for violation of the rules and not an *Order* of the Commission and since it was for violations continuing more than 30 days after service of the *Memorandum Opinion and Order* denying Quincy's waiver request *(Quincy I)*, a resolution of both of these arguments in favor of Quincy would not result in any change in the outcome of this proceeding. We need not therefore address in detail Quincy's arguments. We would note, however, that Congress recently amended Section 408 to provide explicit authority for the Commission to make orders effective on less than 30 days' public notice. *See* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 58 (1982).[13]

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[11] Section 312(c) of the Communications Act states, in pertinent part:

> Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein.

[12] Section 408 of the Communications Act states, in pertinent part: "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect with such reasonable time, not less than thirty days after serivce of the order. . . ."

[13] We note, with respect to Quincy's arguments concerning Sec-

12. The second argument raised relates to compliance with the requirements of the APA. Section 558(c) of the APA specifies that if a proper application for a new license or for renewal of a license is on file, the existing license "does not expire until the application has finally been determined by the agency." This provision is urged to be relevant in the present context because "license" is a defined term in Section 551(8) of the APA, which includes "statutory exemption or other form of permission." If the exemption from the mandatory signal carriage rules provided Quincy during the pendency of its waiver application is an APA "license" then arguably that license continues in force past the time of the Bureau Chief's decision until the matter is finally determined by the agency. If this were the case, no rule violation could be said to have occurred. However, Section 551(8) of the APA, in defining the term "license," does not refer to exemptions in general, but only to "statutory exemption[s]" as well as other traditionally understood forms of "permission" or "registration." A request such as Quincy's *not* to carry signals required by law is not included in this definition. It is Section 551(11) of the APA which refers to "exemption[s]," as well as other actions beneficial to persons upon application therefor, defining such actions and exemptions

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tion 312 of the Communications Act, that this section is manifestly not meant to circumscribe forfeiture proceedings instituted pursuant to Section 503 of the Communications Act, which are of a separate and distinct nature. *American Cable Television, Inc.* (Fountain Hills, Arizona), FCC 81-555, 88 FCC 2d 593, 604 (1981); *Star Stations of Indiana, Inc., et al.*, FCC 71-365, 28 FCC 2d 691, 692 (1971); *Friendly Broadcasting Co.*, 23 RR 2d at 897. *Cf. Midwest Television, Inc. (KFMB-TV), et al.*, FCC 66-683, 4 FCC 2d 612, 622-623 (1966) (Section 312 does not circumscribe temporary relief provisions of waiver rules).

as "relief," apart from the APA's concept of licenses and licensing procedures.[14]

13. A third argument made is that specific provisions of the Commission's Rules provide Quincy with protection from having to comply with the mandatory carriage rules until such time as the administrative processes relating to its waiver petition are complete. Section 76.7(g) of the Rules provides that if a waiver petition is timely filed, a cable system "need not carry the signal of the requesting station pending the Commission's Ruling on the petition or on the question of temporary relief pending further proceedings." Quincy interprets this to mean that, so long as a request for stay or a petition of some type remains pending, compliance is automatically excused.

14. This is a misinterpretation of the import of Section 76.7(g) of the Rules. This rule had its genesis in former Section 74.1109(h) of the Rules, which allowed the timely filing of an appropriate petition for waiver to stay a carriage requirement "... pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures." The further procedures referred to, however, were only those supplementary to the standard written submissions at the inception of a waiver proceeding, in those few cases in which written submissions alone were insufficient to resolve the pending matter. *Second Report and Order in Docket Nos. 14895, 15233, and 15971,* FCC 66-220, 2 FCC 2d 725, 764-766 (1966). *See also Memorandum Opinion and Order in Docket No. 15971,* FCC 66-354, 3 FCC 2d 400, 401-402 (1966). This is echoed in the current rules, in Section 76.7(f) of the Rules, which states in pertinent part: "In the event that an evidentiary hear-

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[14] Moreover, we note that Section 558(c) of the APA specifically refers to ". . . a license required by law," which does not contemplate a request *not* to carry signals otherwise required by rule or law.

ing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party *pending the hearing* and the nature of any such temporary relief." (emphasis added). In proceedings involving questions of television broadcast signal carriage, however, the evidentiary hearings required by the 1966 cable television rules were found to be unnecessarily burdensome, and were eliminated in 1968. *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 148 (1972); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, FCC 68-1176, 15 FCC 2d 417, 432-434 (1968). Nevertheless, the Commission stated that it had ". . . retained special relief rules," *Cable Television Report and Order*, 36 FCC 2d at 186, in this instance Section 76.7(g) of the Rules, allowing for an automatic stay of carriage requirements ". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings." The actual change in language was, apart from conforming editorial changes to new rule numbers, to delete the word "interlocutory" from the rule, and to substitute the word "proceedings" for "procedures." However, we do not agree that successive filings of requests for stay will prolong indefinitely the automatic stay of Section 76.7(g) of the Rules. Such an effect was not contemplated nor intended by former Sections 74.1109(f) and 74.1109(h) of the Rules. Indeed, in view of the Commission's desire to avoid burdensome special relief proceedings, we do not read Section 76.7(g) as allowing an automatic stay beyond the time that the Commission (or its designated authority) acts on an initial petition for relief. Accordingly, while Quincy's timely filed petition for waiver in 1979 stayed Quincy's carriage obligations vis-a-vis the affected stations, this automatic stay expired upon the resolution of *Quincy I*.

15. While Quincy argues that Section 704 of the APA either rendered the Bureau Chief's decisions in *Quincy I* and *Quincy II* inoperative pending review by the full Com-

mission, or subjected them immediately to judicial review, we disagree. Section 704 of the APA states, in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final *for the purposes of this section* whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule *and* provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (1977) (emphasis added). While Section 5 (d)(7) of the Communications Act and Section 1.115(k) of the Rules make the filing of an application for review a condition precedent to judicial review of delegated actions, neither Sections 5(d)(3) nor 5(d)(4) of the Communications Act grants an automatic stay on such a filing. In fact, Section 1.102(b) of the Rules states that stays of delegated actions are discretionary.[15] Nor do we feel that our existing procedures for rehearing constitute either a prior restraint or an intolerable deferral of access to review in contravention of the first amendment, which would be impermissible under, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[16] Finally, nothing in

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[15] *See also* Section 705 of the APA, Section 405 of the Communications Act, and Section 1.106(n) of the Rules, setting forth the discretionary nature of stays on the part of an agency.

[16] With regard to Quincy's contention that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as an effective or final order, we do not read the APA so rigidly, nor have the courts. *See, e.g., FTC v. Standard Oil Co. of California*, 101 S. Ct. 488, 493 (1980). *Cf. Bucks County Cable TV, Inc. U.S.*, 299 F. Supp.

Quincy's numerous arguments gives us any justification for a mitigation of the $5,000 dollar forfeiture.[17]

In view of the foregoing, we find that grant of Quincy's petition is not in the public interest.

Accordingly, IT IS ORDERED, That the "Motion to Strike" filed May 17, 1982, by King Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Strike" filed May 18, 1982, by Spokane Television, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed June 4, 1982, by Quincy Cable TV, Inc. IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 503 (b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, That Quincy Cable TV, Inc. FORFEIT to the United States the sum of five thousand dollars ($5,000) for willful or repeated violation of Section 76.57(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of this Memorandum Opinion and Order, the case will be referred to the Department of Justice for collection,

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1325, 1334 (E.D. Pa. 1969), *rev'd on other grounds,* 427 F. 2d 438 (3d. Cir. 1970), *cert. denied,* 400 U.S. 831 (1970) (automatic stay constitutes final action).

[17] We also note an erroneous reference to an obligation on Quincy's part to carry the signal of Station KALB-TV (NBC, Channel 5), Alexandria, Louisiana, in *Quincy II* at 66. This was an editorial error, and is rescinded.

pursuant to Section 504(a) of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order shall be sent by Certified Mail—Return Receipt Requested to Quincy Cable TV, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

32880

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration

ERRATUM

Released: February 23, 1983

The Memorandum Opinion and Order (FCC 83-60) in the above entitled matter, released February 17, 1983, is corrected to read after the phrase "By the Commission:" Commissioner Jones dissenting and issuing a statement.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Statement of Commissioner Jones attached.

February 18, 1983

Dissenting Statement of
Commissioner Anne P. Jones

In Re: Petition for Reconsideration filed June 4, 1982, by Quincy Cable TV, Inc.

When this case first came before the Commission on April 22, 1982, I reluctantly concurred in affirmance of the Bureau Chief's denial of the relief requested by Quincy Cable. On reconsideration, I have concluded that Quincy should be granted that relief.

In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps must as a matter of law, rest with Quincy Cable.

Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest that any of the stations target any of their programming to Quincy.

Quincy Cable insists that it is constitutionally entitled to use its limited channels to provide its customers with

programming of its and their choice brought in from Seattle and elsewhere. I believe it may be correct.

In its April 22, 1982, Memorandum Opinion and Order, the Commission answered Quincy Cable's constitutional arguments in part by asserting that in foootnote 16 to its decision in *Midwest Video II* the U.S. Supreme Court "distinguished the mandatory signal carriage rule [from the access rules in question in that case] and reconfirmed their validity." 89 F.C.C. 2d 1135. It seems to me, though, that read in context, that footnote does nothing more than distinguish these rules.

If we are to infer law from footnotes, I believe that for purposes of the present case footnote 19, in *Midwest Video II* is more significant than footnote 16. In footnote 19, the Supreme Court noted the opinion by Chief Judge Markey for the U.S. Court of Appeals for the Eighth Circuit in that case and said:

> "The Court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forego comment on these issues as well." 440 U.S. 709

Footnote 19 seems a virtual invitation by the court for a proper case in which to consider the constitutional arguments pressed so insistently by Quincy Cable in this one.

Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

I therefore respectfully dissent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 84-425
34974

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1984 Released: September 20, 1984

By the Commission: Commissioners Rivera and Patrick absent.

Introduction

1. This proceeding, involving Quincy Cable TV, Inc. (hereinafter "Quincy"), operator of a cable television system serving Quincy, Washington, is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit, pursuant to the court's decision in *Quincy Cable TV, Inc. v. FCC,* 730 F.2d 1549 (D.C. Cir. 1984) (*per curiam*). The remand was ordered to enable the Commission "to consider Quincy Cable's claims in light of the current facts," *id. at* 1551; specifically, the expansion by Quincy of its cable system to 32-channel capacity, arranged in various tiers.

2. On November 27, 1979, Quincy requested a waiver of Section 76.57 of the Commission's Rules,[1] to delete Stations KREM-TV (CBS, Channel 2), KXLY-TV (ABC, Channel 4), and KHQ-TV (NBC, Channel 6) all Spokane, Washington, from its cable system.[2] Quincy argued that these signals could be received over-the-air without cable so that carriage was unnecessary, and that the channels occupied by these signals were needed to carry alternative programming not otherwise carried on the system. This petition was denied by the Chief of the Cable Television Bureau. *Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter "Quincy I"]. Quincy thereafter did not comply with the rules, but file instead petitions for stay and for reconsideration,[3] and subsequently for review by the full Commission.

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[1] Quincy's signal carriage obligations are now determined by Section 76.59 of the Rules, due to the licensing of Television Broadcast Station KCWT (Ind., Channel 27), Wenatchee, Washington. While stations seeking to invoke the mandatory carriage provisions of our Rules would now predicate such requests upon Section 76.59 rather than Section 76.57 of the Rules, this change has not altered the factual bases entitling the Spokane stations to carriage on Quincy's cable system.

[2] Stations KHQ-TV, KXLY-TV and KREM-TV are entitled to mandatory carriage on the Quincy cable system, pursuant to Section 76.59(a)(6) of the Commission's Rules, since they are significantly viewed in Grant County, Washington, the county in which Quincy's cable system is located. Alternatively, KHQ-TV and KXLY-TV are also entitled to mandatory carriage, pursuant to Section 76.59(a)(5) of the Commission's Rules. since their signals are carried by 100-watt translator stations, K83AJ and K77AO, respectively, which serve the community of Quincy, Washington. *See* Section 76.55(c) of the Commission's Rules.

[3] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter *"Quincy II"*]; *Quincy Cable TV, Inc.* (Quincy, Washington) (adopted September 2, 1981) [*"Quincy III"*].

The Commission affirmed the decisions of the Bureau Chief, however, and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating that the filing of stay, reconsideration, and waiver does not automatically stay the effect of a decision made pursuant to delegated authority. *Quincy Cable TV, Inc.* (Quincy, Washington), 89 FCC 2d 1128 (1982) [hereinafter *"Quincy IV"*].[4] Subsequently, the Commission denied Quincy's request for reconsideration and for mitigation of the forfeiture, rejecting Quincy's statutory and constitutional challenges to the enforcement of the Bureau Chief's decision. *Quincy Cable TV, Inc.* (Quincy, Washington), 93 FCC 2d 412 (1983) [*"Quincy V"*]. Quincy thereupon petitioned for judicial review.

3. Although Quincy had consistently maintained throughout these proceedings that it possessed merely 12-channel capacity, prior to oral argument new facts concerning Quincy's channel capacity came to light, revealing that Quincy had expanded its channel capacity to 32 channels. This led to the remand of the instant proceeding. *Quincy Cable TV, Inc. v. FCC, supra.* On April 11, 1984, the Chief of the Mass Media Bureau, pursuant to the court's remand and to Sections 1.65 and 76.7 of the Rules, ordered Quincy to supplement its filings in this proceeding within twenty days, and afforded opposing parties ten days within which to respond. Following a request for extension of time, Quincy filed its supplement on May 14, 1984. KREM-TV, KHQ-TV, and KXLY-TV have responded.

Summary of Pleadings

4. Quincy, in its supplement, notes that it commenced operations in August 1978 with 12 channels, and subsequently expanded to 24 channels in June 1982; it further expanded to 32-channel capacity in January 1983, 27 of

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[4] Following this decision, Quincy resumed carriage of the Spokane licensees on June 3, 1982, on its basic tier.

which channels are presently utilized.[5] These channels are offered to Quincy's subscribers in six tiers as follows:

Tier	*Number of Channels*	*Subscribers*	*Monthly Charge*
I (Basic)	12[6]	972	$10.95
II	11[7]	192	$ 5.95
III	1 (Home Box Office)	361	$10.95[8]
IV	1 (Cinemax)	172	$10.95[8]
V	1 (The Disney Channel)	119	$10.95[8]
VI	1 (Galavision)	78	$ 7.00

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[5] Quincy states that it would cost the system $6,000 per channel to add additional satellite-delivered services to its program offerings. The 1982 and 1983 expansions cost the system "approximately $250,000."

[6] In addition to Stations KREM-TV, KXLY-TV, KHQ-TV, and KCWT, this tier also includes: Stations KOMO-TV (ABC, Channel 4), KING-TV (NBC, Channel 5), and KIRO-TV (CBS, Channel 7), all Seattle, Washington; KSPS-TV (ETV, Channel 7), Spokane, Washington; WTBS (Ind., Channel 17), Atlanta, Georgia; WOR-TV (Ind., Channel 9), Secaucus, New Jersey; WGN-TV (Ind., Channel 9), Chicago, Illinois; and The Weather Channel. All of these additional services are discretionary.

[7] This tier includes: Station KAYU-TV (Ind., Channel 28), Spokane, Washington; Cable News Network (CNN); local origination; C-SPAN; USA Network; Music Television (MTV); Spanish International Network; CNN Headline News; Entertainment and Sports Programming Network (ESPN); Lifetime; and the Nashville Network. All of these services are discretionary.

[8] For tiers III, IV, and V, subscribers pay $10.95 for the first such service, $8.95 for the second, and $7.95 for the third.

In addition, Quincy submits what it describes as unsolicited subscriber complaint letters received in April and May 1984, and Quincy's responses to these letters.[9] Quincy contends that, prior to the Commission's denial of Quincy's waiver requests, the system "experienced virtually no subscriber complaints relating to its service offerings." Quincy states that it wishes to place the three Spokane network affiliates on tier II, and replace them on tier I with the more popular CNN and ESPN, formerly carried on that tier, and with a local origination and advertising channel. Some limited local expression is carried currently on the Weather Channel, Quincy avers, and the system does not originate any commercial advertising. Quincy argues that such a tiering arrangement would better serve the public interest than its present scheme does, and would attract a number of lost subscribers.[10] Quincy claims that it is motivated by its subscribers' preferences—particularly those of its senior subscribers who enjoy popular reruns and old movies—which are not met by the Commission's signal carriage rules.

5. KREM-TV, in its response filed May 24, 1984, argues that Quincy seeks to avoid its signal carriage obligations, and "to tier the Spokane signals in order to maximize its profits." This goal, however desirable, is not constitutionally protected, contends KREM-TV, particularly in view of Quincy's increased channel capacity.

6. KHQ-TV responded to Quincy on May 24, 1984, contending that Quincy's arguments are "nothing other than . . . marketing whims and desires . . . ." Unlike the Spokane

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[9] Quincy submitted an additional subscriber complaint letter in a further supplement on May 21, 1984.

[10] Quincy states that the prior Commission orders have caused Quincy's basic subscribership to drop from 1,018 to 972, whereas modification of the system's tiered offerings as proposed would cause its subscribership to rise to about 1,200 by January 1985. *But see* note 16, *infra*.

network affiliates, which are broadcast locally by television translator stations, notes KHQ-TV, the Seattle affiliates, which Quincy prefers not to relocate to a different tier, are not locally available off-air, but are imported by Quincy by its own choice.

7. KXLY-TV opposed Quincy's supplement on May 29, 1984. KXLY-TV argues that Quincy's expansion of its channel capacity has rendered moot the factual basis upon which the system had originally sought special relief, irrespective of Quincy's tiering choices and desires. KXLY-TV contends that Quincy has offered no factual evidence to demonstrate that a waiver of the mandatory signal carriage rules would be in the public interest.

Discussion

8. If Quincy had abided by the representations made in its initial special relief request (that it would carry the signals of KREM-TV, KXLY-TV, and KHQ-TV, at such time as it had the channel capacity to do so), the special relief aspects of this proceeding would now be moot. However, the forfeiture imposed has not been paid and Quincy now continues to press for an exemption from the requirements of the rules. We are not, therefore, in a position to conclude that the controversy has been terminated. In addition, since all of the additional information now on the record goes toward weakening the initial grounds urged for waiver, no reason is presented that would justify any change in the initial decision. In neither its present pleadings nor in its earlier submissions has Quincy demonstrated by the substantial proof required for grant of a waiver that its request would be consistent with the substantial governmental interests underlying our signal carriage rules as recognized by the Supreme Court.[11] Quincy's request continues to be

[11] *Capital Cities Cable, Inc. v. Crisp*, 52 U.S.L.W. 4803, 4809 (1984); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

devoid of concrete evidence showing that grant of a waiver would be consistent with our policies regarding mandatory carriage of significantly viewed signals, and of translator stations serving the community.

9. Quincy's supplemental filings reveal that the system today, even more than before, possesses the capacity to accommodate KREM-TV, KHQ-TV, and KXLY-TV. That Quincy chooses or desires to tier its service and program offerings in one manner or another is principally a matter within the operator's discretion.[12] However, this does not diminish the right of a significantly viewed station to maintain access to its audience through cable carriage, on a cable system's basic tier of service. *Id.* In addition, it is the Spokane network affiliates, whose programming is broadcast locally via translator stations, which also serve Quincy, Washington.[13] The Seattle stations are available in

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[12] The degree of this discretion has been discussed in other proceedings. *See, e.g., Monterey Peninsula TV Cable* (Salinas, California), 56 RR 2d 159 (1984), *appeal docketed sub nom. Sainte Broadcasting Corp. v. FCC,* No. 84-1209 (D.C. Cir. May 31, 1984); *Community Cable TV, Inc.,* —— FCC 2d —— (1984), *appeal docketed sub nom. National League of Cities v. FCC,* No. 84-1349 (D.C. Cir. July 26, 1984, *appeal docketed sub nom. Public Service Commission of Nevada v. FCC,* No. 84-1350 (D.C. Cir. July 26, 1984), *appeal docketed sub nom. Cable Television Information Center v. FCC,* No. 84-1437 (D.C. Cir. Aug. 23, 1984).

[13] We have previously recognized that translator stations serve the public interest by expanding television service to underserved areas. *See, e.g., Second Report and Order in Docket Nos. 14895, 15233, and 15971,* 2 FCC 2d 725, 757-758 (1966); *Report and Order in Docket No. 15858,* 1 FCC 2d 15 (1965). In fact, on request, translators of 100 watts or higher power are entitled to mandatory carriage on local cable systems. *See, e.g.,* Section 76.59 (a)(5) of the Commission's Rules; *Report and Order in BC Docket No. 78-253,* 51 RR 2d 476, 521 n. 81 (1982); *Cable Television Report and Order,* 36 FCC 2d at 174 n. 42; *Docket Nos.*

the area only because Quincy has chosen to import their programming by microwave.

10. The remainder of Quincy's arguments are equally unpersuasive. Quincy argues that its 24-hour Weather Channel on Tier 1 is necessary as a limited outlet for local expression and origination. However, prior submissions by Quincy reveal that this service replaced a full local origination channel in 1982.[14] This is, in fact, as revealed by Quincy's current submissions, one of several tiering rearrangements and program substitutions performed by Quincy, many of which occurred prior to the return of the Spokane affiliates to Quincy's system. Indeed, Quincy could have avoided much of its program lineup disruptions had it not deleted the Spokane stations in the first instance, and abided by our rules. We note, too, that Quincy previously has stated that it intended to carry these stations once the system expanded its channel capacity.[15] In view of the history, we cannot say that the voluntary decision by certain of Quincy's subscribers to discontinue their subscriptions is due to any action by this Commission.[16] Moreover, this is

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14895, 15233, and 15971, 2 FCC 2d at 758. In the instant case, it is the Spokane affiliates themselves which have requested carriage, although they are carried on Quincy's system via local translators. *See* Section 76.55(c) of the Commission's Rules.

[14] *See* Quincy's supplement, filed April 21, 1982, in *Quincy IV* proceedings.

[15] *E.g.*, petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 8; "Petition for Reconsideration" filed May 28, 1980, by Quincy in *Quincy II* proceeding, at 3; letter filed June 23, 1981, by Quincy in *Quincy II* proceeding.

[16] Despite Quincy's complaints of lost subscribers, we note that the system had only 609 subscribers at the inception of this proceeding. Petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 2.

underscored by a careful reading of the subscriber letters submitted by Quincy. In addition, that certain program services which Quincy now carries on Tier II may allegedly be more popular than the Spokane affiliates is not grounds for waiver. *E.g., Pioneer Cablevision Corp.* (Endicott, New York), 50 FCC 2d 821, 822 (1975). Having considered "[Quincy's] claims in light of the current facts pertaining to [Quincy's] channel capacity, tier structure, and other factual developments . . .," *Quincy Cable TV, Inc. v. FCC*, 730 F.2d at 1551, we find no reason to depart from our previous decisions, which we view as representing a consistent and rational policy.

11. In view of the foregoing, we find that grant of the waiver requested by Quincy is not in the public interest.

12. Accordingly, IT IS ORDERED, That the objections raised by Quincy Cable TV, Inc. on remand from the United States Court of Appeals for the District of Columbia ARE DENIED, and our previous disposition of this case IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX E

§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(2) Television translator stations with 100 watts or higher power serving the community of the community unit, and, as to community units that commence operations or expand channel capacity after March 30, 1972, non-commercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13866, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

§ 76.59 Provisions for smaller television markets.

A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt. —Plattsburgh, N.Y., television market);

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(c) Where the community is located wholly or partially within one of the major television markets listed in § 76.51 (a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

§ 76.61 Provisions for the major television markets.

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the

specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2)Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(4) Television broadcast stations licensed to other designated communities of the same major television [illegible] (Example: Cincinnati, Ohio-Newport, Ky., televisi[illegible]ket);

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

APPENDIX F

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

August 2, 1985

COMMISSION WILL NOT APPEAL QUINCY CABLE TV v. FCC

The Commission directed the General Counsel not to pursue further appeal of the cable television mandatory carriage decision released July 19, 1985, by the U.S. Court of Appeals for the District of Columbia Circuit.[1] That decision vacated the Commission's "must carry" rules and becomes effective September 3, 1985, in the absence of a further order by the Court.

Pending the effective date of the Court's Order, and to permit other parties a full opportunity to pursue an appeal, the Commission will, in the interim, maintain the status quo of cable systems. That is, no new signal carriage will be required nor may cable systems delete currently carried local signals under the must-carry rules.

- FCC -

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[1] *Quincy Cable TV v. FCC*, No. 83-1283 (D.C. Cir., decided July 19, 1985)

August 2, 1985

Statement of Chairman Mark S. Fowler and Commissioners Mimi Weyforth Dawson and Dennis R. Patrick

Re: Appeal of *Quincy Cable TV v. FCC*

Our decision not to appeal the Court's ruling in this case is one that comes after much thought about the role of the must carry rules in the mass media marketplace of today. Those rules displaced consumer choice in many cases and so interfered with the marketplace. But this interference was defended by the Commission in view of the partial exemption from the market which cable operators had under the copyright law. After *Quincy* the situation has again become unbalanced and deserves a solution.

Although this *Quincy* decision takes the first step toward a true marketplace for the distribution of programming by cable systems, we believe that the mass media marketplace will not be set entirely right until cable's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties.

The *Quincy* decision focused very directly on the First Amendment issues involved. Because the constitutional analysis as to cable represents a positive step toward recognizing full First Amendment protection for all forms of electronic media, we will not challenge it.

We have carefully considered the possibility of retooling the must carry rules. At this point we cannot conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision. Accordingly, we believe that the better course is to seek an equitable realigning of free marketplace forces rather than another false equilibrium of intrusions on the rights of cable operators, broadcasters, and copyright holders.

NEWS

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

6197

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ. 1975)

August 5, 1985

COMMISSIONER JAMES H. QUELLO ISSUES DISSENTING STATEMENT ON DECISION NOT TO APPEAL CABLE "MUST CARRY" DECISION

On August 2, the Commission directed the General Counsel not to pursue further appeal of the cable television mandatory carriage decision released July 19, 1985, by the U.S. Court of Appeals for the District of Columbia Circuit. That decision vacated the Commission's "must carry" rules and becomes effective September 3, 1985, in the absence of a further order by the Court. Commissioners Fowler (Chairman), Dawson and Patrick had issued a joint statement. Commissioner Quello has now issued the attached dissenting statement. Commissioner Rivera did not participate.

- FCC -

Attachment

August 2, 1985

Dissenting Statement of
FCC Commissioner James H. Quello

In re: Public Notice: "Commission will Not Appeal *Quincy Cable TV v. FCC,*" released August 2, 1985.

I am writing to indicate my opposition to the Commission's decision not to pursue any appeal of *Quincy Cable TV, Inc. v. FCC (Quincy),* D.C. Cir. No. 83-1283 (July 19, 1985). While the cable industry's embrace of the First Amendment has found recent favor in the courts, this particular interpretation is both unnecessary and excessive, and it should not go unchallenged.

In the first place, the court has improperly gone out of its way to make broad constitutional pronouncements that are unnecessary to its basic determination that the Commission has not adequately demonstrated the need for its must-carry rules. In this regard, it is relevant that the Supreme Court recently relied upon the existence of the must-carry rules as evidence of federal preemption, and it failed to even hint at any constitutional infirmity. *See Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694 (1984).

In the second place, the *Quincy* opinion improperly dismisses the importance of the current local regulatory environment in which cable companies generally enjoy exclusive franchises and thus operate as bottlenecks to viewer choice. *Quincy, supra* (slip op. at 31-32). Similarly, while the cable industry, and now the court, talk at length about A/B switches and their utility in receiving over-the-air services, such points blink the reality that these devices are quite unlikely to be installed or used.

I do not argue that the must-carry rules should not be revisited to address legitimate concerns raised by the court. I favor a Notice of Proposed Rulemaking to do just that.

Even if the Commission should determine to abandon its must-carry rules, it would be far preferrable to do so in a rulemaking context with full opportunity for public comment on the wide-ranging effects that would flow from such a decision (*e.g.*, the impact on local rate regulation of cable).

By its failure to appeal this decision, the Commission is abandoning rules that continue to have the sound purpose of assuring local diversity. By simply accepting the policy determinations inherent in this opinion, the Commission is abandoning its own congressional mandate to formulate communication policy in the public interest. I dissent.

NEWS

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

6973

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ. 1975)

September 10, 1985

CABLE MUST CARRY RULES VACATED

In its decision in *Quincy Cable TV, Inc. v. FCC*, No. 80-1283 (D.C. Cir. July 19, 1985), the United States Court of Appeals held that the Commission's regulations requiring that cable television systems carry certain local television broadcast stations violate the cable operators' rights under the First Amendment to the Constitution of the United States. On September 9, 1985, the Supreme Court refused to stay this ruling. The mandate of the Court of Appeals thus issues today, September 10, 1985. The must carry rules had remained in effect pending the issuance of the mandate.

Effective today, September 10, 1985, the Commission's must carry rules are set aside and will no longer be enforced. The National Association of Broadcasters and other parties have indicated that they will file a Writ of Certiorari in the Supreme Court. Therefore, the rules will remain codified in Title 47, Code of Federal Regulations, pending a final decision of the Supreme Court.

The Commission's Mass Media Bureau has taken a number of actions related to this matter. It has dismissed as moot over 230 pending proceedings related to the must

carry rules. These include requests for special relief filed by cable systems, requests for changes to the Commission's list of hyphenated markets, and certain requests for enforcement action against cable systems.

The Bureau also issued an Order reopening for 30 days the period for filing comments in MM Docket No. 84-1296 concerning the recently adopted rules implementing the provisions of the Cable Communications Policy Act of 1984. Such comments should be limited to the definition of basic cable service in Section 76.5(pp) of the Commission's rules.

Additionally, the Mass Media Bureau has accepted certain recently filed petitions which are not invalidated by the decision concerning mandatory signal carriage. These petitions relate to such matters as requests for declaratory rulings involving "significantly viewed" status. Such status is still a matter of interest under the Commission's new rules related to effective competition and/or copyright.

For further information contact Stephen R. Ross, Cable Television Branch (202) 632-7480. For information relating to MM Docket 84-1296 contact Bruce A. Franca, Policy Analysis Branch (202) 632-6302.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

6981

MM Docket No. 84-1296

In the Matter of:

AMENDMENTS OF PARTS 1, 63, AND 76 OF THE COMMISSION'S RULES TO IMPLEMENT THE PROVISIONS OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984

ORDER REOPENING THE PERIOD FOR FILING COMMENTS

Adopted: September 10, 1985 Released: September 10, 1985

By the Chief, Mass Media Bureau:

1. On April 11, 1985, the Commission adopted a *Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985), amending its rules in order to implement certain provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984). Various parties have filed petitions for reconsideration of the *Report and Order*, and responsive pleadings.

2. In its decision in *Quincy Cable TV, Inc. v. FCC*, No. 83-1283 (D.C. Cir. July 19, 1985), the United States Court of Appeals held that the Commission's regulations requiring that cable television systems carry certain local television broadcast stations violate cable operators' rights under the First Amendment to the Constitution of the United States.

3. In view of this decision, the record in MM Docket No. 84-1296 will be reopened to enable parties to comment upon the impact that the Court's decision has on the issues discussed in that *Report and Order*. Comments should be

limited to how the decision affects the definition of basic cable service in Section 76.5(pp) of the Commission's Rules.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.415(d) of the Commission's Rules, That the period for filing comments in the above captioned proceeding is REOPENED to and including October 17, 1985.

5. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.*

6. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 5 copies of all comments filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission's Dockets Reference Room (Room 239) at its headquarters in Washington, D.C. (1919 M Street, Northwest).

7. This action is taken pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules.

8. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are

advised that *ex parte* contacts are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the time a public notice is issued stating that substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communications (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commisison's Secretary for inclusion in the public file, with a copy to the Commission's official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by Docket Number the proceeding to which its relates. See generally, Section 1.1201 of the Commission's Rules.

9. For further information concerning this proceeding, contact Bruce A. Franca, Policy Analysis Branch, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

/s/ JAMES C. MCKINNEY

James C. McKinney
Chief, Mass Media Bureau